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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1890.

No. 1607.

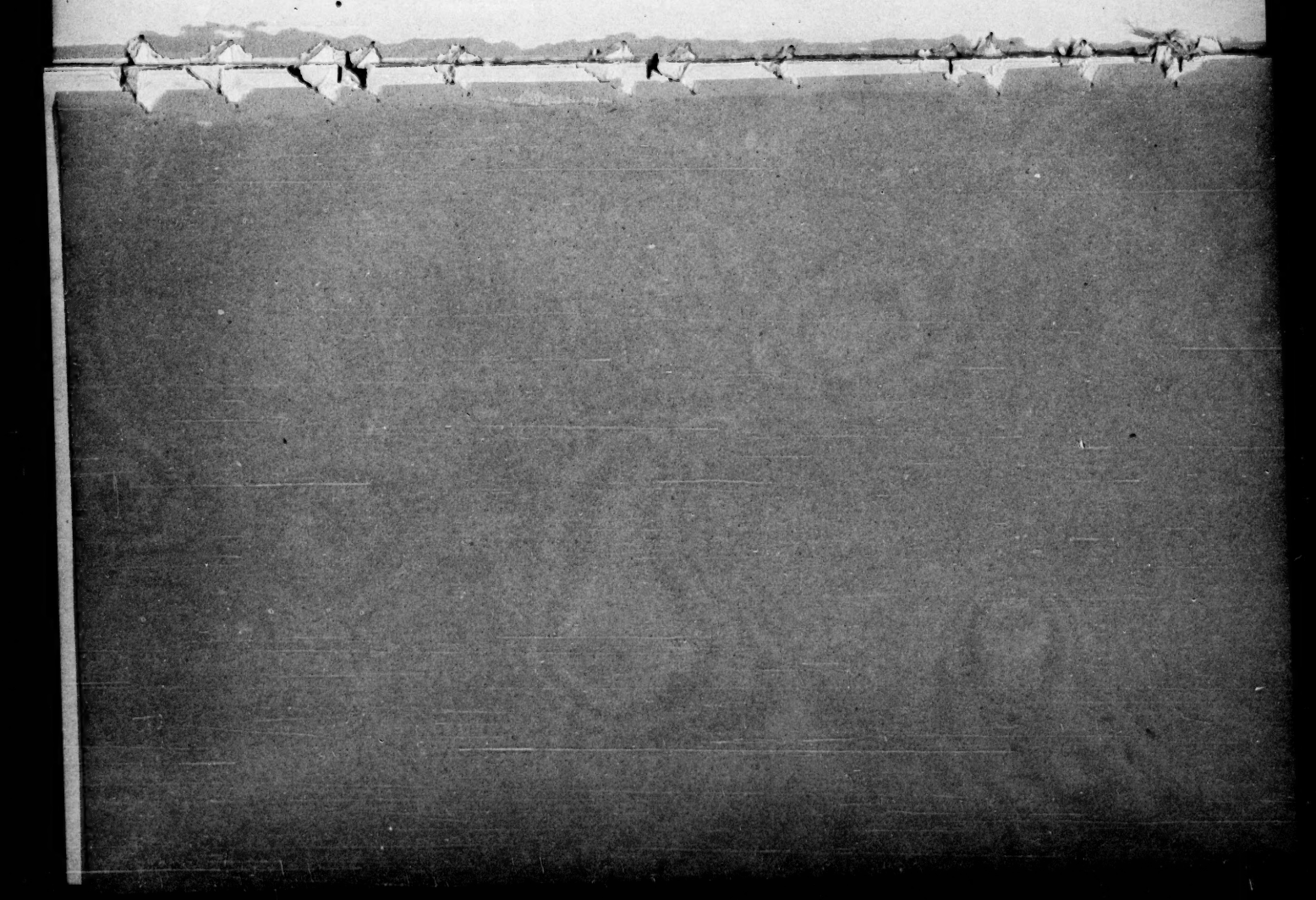
PATRICK MANNING, PLAINTIFF IN ERROR,

vs.

GEORGE WEEKS, WARDEN OF THE WISCONSIN STATE PRISON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

FILED FEBRUARY 2, 1891.



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INDEX.

	Original.	Print.
Writ of error	1	1
Citation	3	2
Stipulation waiving bond, &c.	4	2
Order on stipulation waiving bond, &c.	5	3
Assignment of errors	6	3
Caption	11	5
Petition for writ of *habeas corpus*	12	5
Exhibit A—Certified copy of proceedings in municipal court	19	9
B—Pleas to jurisdiction	22	10
Plea in abatement	23	11
Information	25	12
C—Docket entries	26	12
D—Certificate of conviction and sentence	28	14
E—Appointment of municipal judge	30	15
F—Appointment of municipal court clerk	33	16
G—Certificate of election of municipal judge	33	16
Order to show cause	34	17
Order taking matter under advisement	35	17
Opinion	36	17
Judgment	45	22
Affidavit of publication of election notice	46	22
Notice of municipal election	47	23
Clerk's certificate and return	51	24

UDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 13, 1891.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said matter of the application of Patrick Manning for a writ of *habeas corpus* in the supreme court of the State of Wisconsin, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit in the matter of the application of Patrick Manning for a writ of *habeas corpus* to inquire into the legality of his imprisonment and custody by Hon. George Weeks, warden of the Wisconsin State prison, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Patrick Manning, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

2

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the fifteenth day of July, in the year of our Lord one thousand eight hundred and ninety.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

F. M. STEWART,
Clerk of the Circuit Court of the United States.

Allowed by—
ORSAMUS COLE,
Chief Justice of the Supreme Court of Wisconsin.

Madison, June 25th, 1890.

[Endorsed:] *In re* Manning. Writ.
[Stamped:] Filed Jul- 17, 1890. Clarence Kellogg, clerk of supreme court, Wis.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Hon. George Weeks, warden of the Wisconsin State prison, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Wisconsin, wherein Patrick Manning is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Orsamus Cole, chief justice of the supreme court of the State of Wisconsin, this 16th day of July, in the year of our Lord one thousand eight hundred and ninety.

ORSAMUS COLE,
Chief Justice of the Supreme Court of Wisconsin.

3½ [Endorsed:] *In re* Pat. Manning. Citation. Service of copy within citation admitted July 16, '90. C. E. Estabrook, att'y gen.
[Stamped:] Filed Jul- 17, 1890. Clarence Kellogg, clerk of supreme court, Wis.

4 Supreme Court of the United States of America.

PATRICK MANNING, Plaintiff in Error,
vs.
GEORGE WEEKS, as Warden of the State Prison of the State of Wisconsin, Defendant in Error.

It is hereby stipulated and agreed by and between Rublee A. Cole, attorney for the plaintiff in error herein, and C. E. Estabrook, attorney general of the State of Wisconsin, attorney for the defendant in error herein, that the plaintiff in error need not file an undertaking for costs herein, and that the same is hereby waived, and that neither party will tax costs against the other in event of judgment in his favor in the Supreme Court of the United States, but that the clerk's costs and the cost of printing the record in the Supreme Court of the United States shall be paid by the plaintiff in error herein, and that each party hereto shall pay his other costs herein.

Dated this 16 day of July, A. D. 1890.

RUBLEE A. COLE,
Attorney for Plaintiff in Error.
C. E. ESTABROOK,
Attorney General of the State of Wisconsin,
Attorney for Defendant in Error.

5 Supreme Court of the United States of America.

PATRICK MANNING, Plaintiff in Error,
vs.
GEORGE WEEKS, as Warden of the State Prison of the State of Wisconsin, Defendant in Error.

Upon the annexed stipulation herein and upon the application of the respective parties, by their counsel, it is hereby ordered and allowed that the writ of error may issue and the record herein pursuant thereto may be transmitted to the Supreme Court of the United States without the filing of an undertaking for costs herein, and subject to such further order as may be proper by the Supreme Court of the United States as to the filing of such bond for costs.

Dated this — day of July, 1890.

——— ———,

Chief Justice of the Supreme Court of the State of Wisconsin.

[Endorsed:] *In re* P. Manning. Stipulation. Service admitted of copy within stipulation & order July 16th, 1890. C. E. Estabrook, attorney general.

[Stamped:] Filed Jul- 17, 1890. Clarence Kellogg, clerk of supreme court, Wis.

6 Supreme Court of the United States of America.

PATRICK MANNING, Plaintiff in Error,
vs.
GEO. WEEKS, as Warden of the State Prison of the State of Wisconsin, Defendant in Error.

Assignment of Errors.

The plaintiff in error respectfully submits the following as his assignment of errors to the judgment of the supreme court of the State of Wisconsin upon his application for a writ of *habeas corpus* and for his discharge thereon and the denial of such relief:

1. That the supreme court of Wisconsin erred in holding that the municipal court of the city and county of Ashland and the office of judge thereof were in existence when the proceedings against the plaintiff in error in said pretended court were had.

2. That the Legislature of the State of Wisconsin, even if it so attempted, in chapter 94 of the Laws of the State of Wisconsin for the year 1889 had no constitutional power to create a municipal court for the city and county of Ashland for a period prior to January, 1890, unless such law in its provisions prescribed for the election of the judge of such court for such period prior to January, 1890, by the qualified electors of such jurisdiction; and if chapter 94
7 of the Laws of the State of Wisconsin for the year 1889 has attempted to create such a court otherwise for such period prior to January, 1890, the State of Wisconsin, by its Legislature, has made and by its highest court has enforced a law which has deprived the

plaintiff in error of his liberty without due process of law, and has denied to plaintiff in error within its jurisdiction the equal protection of its laws; that the supreme court of Wisconsin erred in giving any force to such law and sanctioning the proceedings pretended to be had thereunder.

3. That the act of Governor Hoard in the pretended appointment of L. A. Calkins as municipal judge of the municipal court of the city and county of Ashland for the period prior to January, 1890, gave Judge Calkins no color of office either *de facto* or *de jure* prior to January, 1890, and the supreme court of the State of Wisconsin erred in holding otherwise.

4. That the State of Wisconsin, by the act of Gov. Hoard in the pretended appointment of L. A. Calkins as municipal judge prior to January, 1890, denied to Patrick Manning, the plaintiff in error herein, the equal protection of the laws within the State of Wisconsin, and deprived the plaintiff in error of his liberty without due process of law, and the supreme court of the State of Wisconsin erred in not so holding.

5. That the supreme court of the State of Wisconsin erred in holding that the plea of abatement to the jurisdiction of the pretended municipal court interposed in the said pretended municipal court did not directly challenge the jurisdiction of said pretended municipal court, and in deciding that such plea in abate-
8 ment raised the question collaterally.

6. That the supreme court erred in not deciding that the imprisonment of the plaintiff in error was without due process of law; that it was involuntary servitude as a punishment for an alleged crime whereof the party had not been duly convicted, and that the plaintiff in error had been denied the equal protection of the laws within the State of Wisconsin, and in not awarding him a writ of *habeas corpus* and granting him his discharge thereon.

7. That the supreme court erred in not holding that Gov. Hoard administered chapter 94, Laws of Wisconsin for 1889, "with an evil eye and unequal hand" in giving such a construction to the law as to endeavor to constitute a court in Ashland county by appointment, and thereby divest the jurisdiction of the justices of the peace and circuit court of criminal jurisdiction, contrary to the laws enforced elsewhere in the State of Wisconsin, and contrary to the plain import of the law upon its face, and contrary to the constitutional provisions of the Constitution of the State of Wisconsin and of the United States.

8. That the supreme court of the State of Wisconsin erred in its construction of chapter 94, Laws of Wisconsin for 1889, against the plain import of the law upon its face, with, it would seem, the purpose of protecting Hon. W. D. Hoard and Judge Calkins in an unwarranted and unconstitutional exercise of authority.

9. That by reason thereof the supreme court of the State of Wisconsin erred in not awarding the plaintiff in error a writ of *habeas corpus* and in not granting him his discharge from the custody of the warden of the State prison of the State of Wisconsin.

9 Wherefore the plaintiff in error prays that the Supreme Court of the United States will reverse the judgment of the supreme court of the State of Wisconsin and will direct such court to grant the plaintiff in error a writ of *habeas corpus* and to order his discharge thereon.

Dated this 16th day of July, 1890.

RUBLEE A. COLE,
Attorney for Patrick Manning, Plaintiff in Error.

10 [Endorsed:] Patrick Manning, plaintiff in error, *vs.* George Weeks, as warden, &c., defendant in error. Assignment of errors. Service of a copy of within assig. errors admitted July 16, '90. C. E. Estabrook.

[Stamped:] Filed Jul- 17, 1890. Clarence Kellogg, clerk of supreme court, Wis.

11 Pleas before the supreme court of the State of Wisconsin, at a term thereof begun and held at the capitol, in Madison, the seat of government of said State, on the first Tuesday, to wit, the seventh day, of January, A. D. 1890.

Present: Orsamus Cole, chief justice; William P. Lyon, David Taylor, Harlow S. Orton, and John B. Cassoday, justices; Clarence Kellogg, clerk.

Be it remembered that on the third day of March, in the year of our Lord one thousand eight hundred and ninety, came into the office of the clerk of the supreme court of the State of Wisconsin Patrick Manning, by Messrs. Cole and O'Keefe, his attorneys, and filed his application for a writ of *habeas corpus* in the words and figures following—that is to say:

12 STATE OF WISCONSIN:

Petition.

In Supreme Court.

In the Matter of the Application of PATRICK MANNING for a Writ of *Habeas Corpus* to Inquire into the Legality of His Imprisonment and Custody by Hon. George Weeks, Warden of the Wisconsin State Prison.

To the supreme court of the State of Wisconsin:

The petition of Patrick Manning respectfully shows:

1st. That your petitioner, Patrick Manning, is imprisoned and restrained of his liberty by the Hon. George Weeks, the warden of the State prison of the State of Wisconsin.

2nd. That the said Patrick Manning is not committed or detained by virtue of any process, judgment, order, or execution specified in section three thousand four hundred and eight of the Revised Statutes of the State of Wisconsin or any act amendatory thereof, as your petitioner is informed and verily believes.

3d. That the cause or pretense of such imprisonment is as follows, to wit:

That a pretended preliminary examination upon complaint and arrest made upon a pretended warrant issued thereon by one L. A. Calkins, pretending to act as the municipal judge of Ashland county, was held in the month of August, 1889, of the said Patrick Manning, on the charge that he did feloniously kill and slay one
13 M. Murray; that upon said pretended examination and at the conclusion thereof the said L. A. Calkins bound the said Patrick Manning, your petitioner, over to the so-called next regular term of the so-called and pretended municipal court of Ashland county to answer to a criminal prosecution for manslaughter, as appears from the certified copy of the proceedings of said pretended municipal court of Ashland county, which is annexed hereto and made a part hereof and marked "Exhibit A;" that on the 5th day of September, 1889, an information was made by George P. Rossman, district attorney of the county of Ashland, Wisconsin, in the said pretended municipal court of Ashland county in a cause entitled The State of Wisconsin, plaintiff, and Pat. Manning, defendant, and which Pat. Manning is your petitioner herein, and that a certified copy of such information, together with the pleas of your petitioner in abatement thereto and of his motion to dismiss the jury in such pretended court, is annexed hereto and made a part hereof and marked "Exhibit B;" that thereupon a pretended arraignment and trial of your petitioner was had in such pretended municipal court of Ashland county in the manner and form and with the result as set forth in the docket of such pretended court, and a certified copy of the docket entries thereon in the docket of such pretended court is annexed hereto and made a part hereof and marked "Exhibit C;" that, as appears therefrom, there was a pretended verdict of a jury in such pretended court that your petitioner, Patrick Manning, was guilty of manslaughter in the third decree, and thereupon said pretended court, on the 9th day of November, 1889, sentenced your petitioner, Patrick Manning, to be confined in the State prison at Waupun for the term of three years; and your petitioner, Patrick Manning, was therefore and thereupon, under a certificate of
14 said court, taken to the said prison and there bound over upon such commitment to the warden thereof and transferred to the custody of the warden of such prison; and your petitioner, Patrick Manning, ever since has been and now is therein confined upon such certificate issued by the pretended clerk of such pretended court upon such pretended trial and sentence; that a copy of said pretended certificate of conviction, demanded of the said warden by the attorneys of your petitioner, is annexed hereto and made a part hereof and certified to by the warden as a true copy and is marked "Exhibit D."

4th. That the said imprisonment and restraint is illegal and void and contrary to law, as your petitioner is informed and verily believes, for the following reasons, to wit:

That at said time there was no such constitutional and legal court as "the municipal court for the city and county of Ashland," and

there was no such office, either *de jure* or *de facto*, as that of municipal judge of Ashland county, and therefore there could be no such officer as municipal judge of Ashland county, either *de jure* or *de facto*, and there was no such office, either *de jure* or *de facto*, as that of clerk of the municipal court of Ashland county, and therefore there could be no such officer as clerk of the municipal court of Ashland county, either *de jure* or *de facto*, and that all proceedings had before said L. A. Calkins and said J. C. Mars and the said pretended jury were illegal and void and contrary to law and the constitutional provisions contained in both the constitution and amendments thereof of the State of Wisconsin and the Constitution and amendments thereof of the United States; that your petitioner, as he is informed and verily believes, is and has been deprived of his liberty without due process of law; that your petitioner, as he
15 is informed and verily believes, has been denied the right of trial by a constitutional jury; that your petitioner, as he is informed and verily believes, has been, by the enactment of chapter 94 of the Laws of 1889 of the State of Wisconsin and by the acts heretofore mentioned and by those hereafter to be mentioned upon the part of W. D. Hoard and one L. A. Calkins and others, *been* by the State of Wisconsin deprived of his liberty without due process of law, and has been denied within the jurisdiction of the State of Wisconsin the equal protection of the laws.

That the said L. A. Calkins, in acting as municipal judge of Ashland county, as your petitioner is informed and verily believes, acted under a pretended appointment from one Hon. W. D. Hoard, Governor of the State of Wisconsin, and under no election by the qualified electors of his judicial district, and that a certified copy of such appointment is annexed hereto and made a part hereof and marked "Exhibit E;" that the said J. C. Mars or John C. Mars, as your petitioner is informed and verily believes, acted as such pretended clerk of the municipal court of Ashland county by virtue of a pretended appointment by the said L. A. Calkins, the said pretended municipal judge, and a certified copy of such pretended appointment is annexed hereto and made a part hereof and marked "Exhibit F;" that said L. A. Calkins, prior to the first Monday in January, 1890, held his office by virtue of no election of the qualified electors in his judicial district, your petitioner is informed and verily believes, and there is annexed hereto and made a part hereof and marked "Exhibit G" a certificate of the county clerk of Ashland county that no election has been held in said county to elect a municipal judge for Ashland county for any term prior to the term beginning on the first Monday of January, 1890.

16 That your petitioner is informed and verily believes that by reason of all the aforesaid facts that the pretended sentence of Patrick Manning, your petitioner, to the State prison at Waupun aforesaid for the term of three years was and is unconstitutional and null and void, and that the said pretended court and the said pretended officers had no constitutional or other authority to impose such sentence, and they were neither *de jure* nor *de facto* officers, and their acts were and are unconstitutional and null and void, and the

said sentence and imprisonment thereunder and said certificate of conviction and the authority under and by which the said warden now holds and restrains Patrick Manning, your petitioner, are each and all of them unconstitutional and null and void and contrary to law and the Constitutions of both the State of Wisconsin and the United States, as your petitioner is informed and verily believes as to all of the same.

Wherefore your petitioner prays for a writ of *habeas corpus* to inquire into the cause of said imprisonment and the legality thereof, and that your petitioner, the said Patrick Manning, may be discharged from said imprisonment.

Yours, &c., COLE & O'KEEFE,
Attorneys for said Petitioner, Patrick Manning, and in His Behalf.

STATE OF WISCONSIN, } ss:
Ashland County, }

Rublee A. Cole, being duly sworn, upon oath says that he is one of the attorneys of the firm of Cole & O'Keefe, above named;
17 that he is one of the attorneys of the petitioner, Patrick Manning, named in the foregoing petition; that he has heard read the above and foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

That he makes this verification for and on behalf of the petitioner, Patrick Manning, above-named and as one of his attorneys; that W. W. O'Keefe, who is one of the members of the firm of Cole & O'Keefe, was in the active management, and the said firm of Cole & O'Keefe generally were the attorneys for the said Patrick Manning at and during the trial and proceedings hereinbefore had and now are his said attorneys, and that the facts stated in said petition foregoing, except those stated on information and belief, and as to those he believes it to be true, are within the personal knowledge of deponent as one of such attorneys, and all the papers, documents, and records referred to except the certified copy of the Governor's appointment of Calkins and the copy of the purported certificate of conviction from the warden are in the different offices respectively named in the city of Ashland, Ashland county, Wisconsin, and the said certified copies have all been obtained by the firm of Cole & O'Keefe and this deponent, as a member of said firm, and have been and now are in the custody of said firm of Cole & O'Keefe and of this deponent, as a member thereof, as such attorneys, and are in a great measure unknown to the petitioner, Patrick Manning, except as stated.

That the reason why this petition is not verified by said Patrick Manning, your petitioner, is that he is now more than one hundred miles from his said attorneys and not within Ashland
18 county and from the place where the records and files pertaining to said imprisonment now are, and that the grounds of belief of deponent are derived from a personal acquaintance with

and knowledge of the facts of the case, as one of the attorneys of Patrick Manning, and a personal attendance upon a portion of the proceedings of the said purported trial and conviction and a personal familiarity and inspection of the records, files, and papers pertaining to the pretended arraignment, trial, conviction, sentence, and commitment to the State prison at Waupun of said Patrick Manning.

RUBLEE A. COLE.

Subscribed and sworn to before me this 13th day of Feb., 1890.

JAMES W. GOOD,

[SEAL.] *Notary Public, Ashland County, Wisconsin.*

(Endorsed as follows: State of Wisconsin, supreme court. State of Wisconsin, plaintiff, *vs.* Patrick Manning, defendant. Petition. Cole & O'Keefe, att'ys for def't. P. O. address: Rooms 20, 21, & 22, Shore's block, Ashland, Ashland county, Wis.)

19 ASHLAND COUNTY, *ss:*

I, J. C. Mars, clerk of the municipal court for the city of Ashland and county of Ashland, do hereby certify that the above is a correct transcript from my docket now in my legal custody of all the entries therein in the action of the State of Wisconsin against Patrick Manning, tried before the Honorable L. A. Calkins, judge of the municipal court for said city and county of Ashland; that I have compared said transcript with said original docket, and that it is a true copy of the entries therein in said action and of the whole thereof.

Dated Ashland, this 11th day of Feb., 1890.

J. C. MARS,

[SEAL.] *Clerk of the Municipal Court.*

20 STATE OF WISCONSIN, } *ss:*
Ashland County, }

In Municipal Court.

Before Hon. L. A. Calkins, judge; Geo. P. Rossman, district att'y.

STATE OF WISCONSIN }
against }
PAT. MANNING. }

Aug. 27th, 1889.—J. C. Choen complains on oath that Pat. Manning did, on the 26th day of May, 1887, at the city of Ashland, in said county, *did* feloniously kill and slay one M. Murray; complaint reduced to writing, subscribed and sworn to, and filed.

Aug. 27th, 1889.—Warrant issued and placed in the hands of J. C. Cohen, under sheriff.

Aug. 29th, 1889.—Warrant returned by Under Sheriff J. C. Cohen; defendant arrested on the 29th day of Aug., 1889, and before the court, in custody.

Aug. 29th, 1889.—Two (2) o'clock p. m., case called; defendant in court.

Geo. P. Rossman appears for State; prisioner arraigned; on motion of defendant case adjourned until Aug. 30th, 1889, at nine (9) o'clock a. m.; prisoner is required to give bail in the sum of two thousand dollars, $2,000, for his appearance at the time and place aforesaid, in default be committed to jail; commitment issued.

Aug. 30th, 1889.—Nine (9) o'clock, case called; prisoner arraigned by Deputy Sheriff J. C. Cohen; case adjourned by consent of parties. This case is adjourned until Aug. 31st, at 9 o'clock a. m., at the municipal court room, in the city of Ashland; prisoner held under same bonds; commitment issued.

21 Aug. 31st, '89.—Nine (9) o'clock a. m., case called; defendant in court. Geo. P. Rossman appears for State.

Cole & O'Keefe appears for defendant.

Patrick Dormedy, Albert Lamb, Dr. Edwin Ellis, and James Duffy sworn for State. State rests. After hearing the argument of counsel the court finds from the evidence that the offense as stated in the complaint was at the time and place therein mentioned committed, and that there is probable cause to believe defendant, Pat. Manning, guilty thereof, and it was thereupon ordered that the defendant, Pat. Manning, give bail in the sum of two thousand dollars ($2,000.00) for his appearance at the next regular term of the municipal court to answer to a criminal prosecution for manslaughter; in default to furnish such bail that he be committed to the county jail to await his trial as aforesaid.

Aug. 31st, '89.—Commitment issued.

J. C. MARS, *Clerk.*

(Endorsed: "Exhibit A.")

22 Municipal Court, Ashland County.

STATE OF WISCONSIN }
vs.
PAT. MANNING. }

And now comes the defendant and moves the court and demands a jury trial in the above-entitled action, wherein Pat. Manning is defendant on a charge of manslaughter, and that such jury be selected and summoned from the body of the county for the trial of said case.

And that the defendant objects to being tried by the regular pannel of thirty-six jurors before the court.

Defendant further moves the court that the jurors summoned and selected at this term of court be, and each of them, discharged for the reason—

1st. That the said jurors and each of them are not selected and summoned according to law.

2nd. That the act organizing the municipal court of Ashland

county applying to the selection of jurors is in conflict with the general law of the State and is unconstitutional and void.

COLE & O'KEEFE,
Defendant's Attorneys.
W. W. O'KEEFE.

(Filed Oct. 8, 1889.

J. C. MARS,
Clerk Ashland County.)

23 Municipal Court, Ashland County.

STATE OF WISCONSIN }
vs.
PAT. MANNING. }

And now comes the defendant — as and for a plea in abatement to the prosecution of this suit — as and for a plea to the jurisdiction of the court alleges:

1st. That the court has no jurisdiction of the subject-matter of the action, in that the defendant is charged with the crime of manslaughter.

2nd. That the Hon. L. A. Calkins has no jurisdiction or authority to try the defendant for the charge set out in the information.

And that from the evidence adduced on the preliminary examination the district attorney had no authority in law to file the information herein.

3d. That the act confer-ing the pretended jurisdiction on the municipal court of Ashland is unconstitutional and void.

COLE & O'KEEFE,
Defendant's Attorneys.
W. W. O'KEEFE.

STATE OF WISCONSIN, }
Ashland County, } *ss:*

Pat. Manning, being duly sworn, says that he is the defendant above named; that he has read the foregoing plea and knows the contents thereof, and that the same is true of his own knowledge.

PATRICK MANNING.

24 Subscribed and sworn to before me this 7th day of October, A. D. 1889.

JAMES W. GOOD,
Notary Public, Ashland Co., Wis.

(Filed Oct. 8, 1889.

J. C. MARS,
Clerk Ashland County.)

25 STATE OF WISCONSIN :

Municipal Court, Ashland County.

STATE OF WISCONSIN
against
PAT. MANNING.

I, Geo. P. Rossman, district attorney of said county, hereby inform the court that on the 26th day of May, in the year 1887, at said county, Pat. Manning did feloniously kill and slay M. Murray, against the peace and dignity of the State of Wisconsin.

Dated August 31st, 1889.

GEO. P. ROSSMAN,
District Attorney.

(Filed Sept. 5, 1889.

J. C. MARS,
Clerk Ashland County.)

STATE OF WISCONSIN, *Ashland County,* } *ss :*

STATE OF WISCONSIN
v.
PAT. MANNING.

I, J. C. Mars, clerk of the municipal court for the city of Ashland and county of Ashland, Wisconsin, do hereby certify that I have carefully compared the annexed copies of information, plea to jurisdiction and in abatement, and demand for jury trial in the above-entitled action with the original information, plea to jurisdiction and in abatement, and in demand for jury trial, and that they are true and correct copies of the said original information, plea to jurisdiction and in abatement, and demand for jury trial, and the whole and every part thereof and of all endorsements thereon.

J. C. MARS,
[SEAL.] *Clerk of the Municipal Court.*

(Endorsed : " Exhibit B.")

26 Geo. P. Rossman, district attorney ; —— ——, dept. att'y ;
L. A. Calkins, presiding judge.

STATE OF WISCONSIN
vs.
PAT. MANNING.

Sept. 5th, 1889.—Information filed by dist. attorney charging defendant with manslaughter, — feloniously, willfully, and of his malice forethought kill and murder one M. Murray on the 26th day of May, 1887.

Oct. 1st, 1889.—Defendant pleads not guilty.

Oct. 8th, 1889.—Defendant enters a plea to jurisdiction in abatement filed.

By consent of parties this action is adjourned until the next regular term of this court; defendant held in two thousand dollars bonds for his appearance; commitment issued.

Nov. 2, 1889.—Order directing a jury to be drawn from the body of the county filed.

Jury list of thirty-six names drawn by Sheriff Matson; jury struck and jury list filed.

Nov. 5th, 1889.—The following are the jurors drawn and sworn to try and determine this action—

Defendant incourt:

C. W. Gilis.	John Sheridon.
Oliver Baker.	T. P. Wentworth.
Theodore Yankee.	John Furgeson.
H. L. Besse.	B. G. Arstrong.
Chas. Klinstiber.	Ed. Beckon.
Ira Eble.	E. H. Taylor.

Albert Lamb sworn.

P. Dormedy and H. H. Reynolds sworn for State. State rests.

Mike Dormedy and Mike Kelly sworn for defense.

27 Nov. 6th, 1889.—Defendant in court.

H. H. Reynolds recalled for the State.

Bob Seeley sworn for the defendant; Pat. Manning sworn for defendant; jury charged by the court at 2 o'clock p. m.; judge's instructions to the jury filed. Jury returned into court at 3.30 p. m. with the following verdict:

We, the jury sworn and empanneled to try and determine the above-entitled action, find that the defendant, Pat. Manning, is guilty of manslaughter in the third degree.

Dated Nov. 6th, 1889.

B. G. ARMSTRONG, *Foreman.*

Nov. 9th, 1889.—Motion for a new trial. District attorney objects to the motion for a new trial for the reason that no notice of a motion for a new trial has been served upon him.

Motion overruled.

Defendant, Patrick Manning, sentenced by the court as follows:

It is hereby ordered and adjudged that you, Patrick Manning, be confined at hard labor in the State prison at Waupun for a period of three years; that the 6th day of May in each year thereof be solitary confinement. Let the term of your imprisonment begin at noon to-day.

By the court.

Dated Nov. 9, 1889.

Sentence filed.

Commitment issued.

Nov. 13.—Receipt for d'f't filed.

28 Nov. 20th.—Exceptions to judge's charge filed. Nov. 20th, 1889.—Assignment of error filed; order, Exhibit A, filed.

ASHLAND COUNTY, *ss:*

I, J. C. Mars, clerk of the municipal court for the city of Ashland and county of Ashland, do hereby certify that the above is a correct transcript from my docket now in my legal custody of all the entries therein in the action of the State of Wisconsin against Patrick Manning upon the trial thereof and after trial at regular terms of municipal court tried before the Hon. L. A. Calkins, judge of the municipal court for said city and county of Ashland; that I have compared said transcript with said original docket, and that it is a true copy of the entries therein in said action, and of the whole thereof.

Dated Ashland this 8th day of February, 1890.

J. C. MARS,
Clerk of the Municipal Court.

[SEAL.]

(Endorsed: "Exhibit C.")

STATE OF WISCONSIN, }
City of Ashland and County of Ashland. }

In Municipal Court.

THE STATE OF WISCONSIN }
against } Certificate of Conviction and Sentence.
PATRICK MANNING. }

29 I, J. C. Mars, clerk of said municipal court, do hereby certify that at and before said municipal court, Hon. L. A. Calkins, judge, presiding, began and held at the municipal court-room, in the city of Ashland, in the county of Ashland, on the 5th day of Nov., 1889, the said Patrick Manning was, in due form of law, convicted of the crime of manslaughter in the third (3) degree, and upon such conviction the said court did, on the 9th day of November, A. D. 1889, pass sentence upon the said Patrick Manning as follows:

It is hereby ordered that you, Patrick Manning, be confined at hard labor in the State prison at Waupun, by the warden thereof, for the period of three (3) years; that the sixth (6th) day of May of each year thereof be solitary confinement; the term of your imprisonment to begin at noon to-day. Let the sheriff of Ashland county put this judgment into execution.

Given under my hand and the seal of the said municipal [SEAL.] court, at the municipal court-room, in the city of Ashland, in said county, this 11th day of Nov., A. D. 1889.

(Signed) J. C. MARS,
Clerk of the Municipal Court.

A true copy.

GEO. WEEKS, *Warden.*

(Endorsed: "Exhibit D.")

30 UNITED STATES OF AMERICA, }
The State of Wisconsin. }

William D. Hoard, Governor, to all to whom these presents shall come, Greeting:

Know ye that, reposing special trust and confidence in the integrity and ability of L. A. Calkins, of Ashland county, I, William D. Hoard, Governor of the State of Wisconsin, have appointed and by these presents do appoint and constitute him municipal judge of Ashland county.

And I do hereby authorize and empower him to execute and fulfill the duties of that trust, according to his best discretion, for the term ending the first Monday in January, A. D. 1890, unless the Governor of this State for the time being shall think proper sooner to revoke and determine this commission.

In testimony whereof I have hereunto set my hand and caused the great seal of the State of Wisconsin to be affixed.

[SEAL.] Done at the city of Madison this fourth day of April, in the year of our Lord one thousand eight hundred and eighty-nine.

WILLIAM D. HOARD.

By the Governor:
ERNEST G. TIMME,
Secretary of State.

31 UNITED STATES OF AMERICA.

STATE OF WISCONSIN, } ss:
Department of State, }

To all to whom these presents shall come:

I, Ernest G. Timme, secretary — state of the State of Wisconsin, do hereby certify that the foregoing copy of record of appointment of L. A. Calkins, of Ashland county, as municipal judge of Ashland county has been compared by me with the original record in this department, and that the same is a true copy thereof and of the whole of such record.

In testimony whereof I have hereunto set my hand and
[SEAL.] *and* affixed my official seal, at the capitol, in the city of Madison, this 10th day of February, A. D. 1890.

ERNEST G. TIMME,
Secretary of State.

(Endorsed: "Exhibit E.")

STATE OF WISCONSIN, } ss:
32 *Clerk's Office, Circuit Court Ashland County,* }

I, R. C. Murray, clerk of said circuit court, do hereby certify that I have compared the within copy with the original duplicate appointment now in my office, and that it is a correct transcript therefrom and of all endorsements thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 10th day of February, A. D. 1890.

R. C. MURRAY, *Clerk.*
[SEAL.] —— ——, *Deputy Clerk.*

33 I, L. A. Calkins, by virtue of the power by law within me vested, hereby designate, appoint, and constitute John C. Mars, of the city of Ashland, clerk of the municipal court of Ashland county, to hold the same, with all the rights, privileges, and emoluments thereto belonging, until the revocation of this appointment.

Dated April 10th, 1889.

L. A. CALKINS,
Municipal Judge.

(Endorsed: "Exhibit F.")

STATE OF WISCONSIN, }
Ashland County. }

I, M. J. Hart, county clerk for the county of Ashland, do hereby certify that pursuant to a notice of election given to be held on the 2nd day of April, A. D. 1889, for the purpose of electing a municipal judge for Ashland county, among other officers, L. A. Calkins was elected to such judg-ship, to take his office on the following January.

That no election was called or had to elect a judge to serve from April the 2nd, 1889, to the first Monday of January, 1890.

And no election was had or called for the election of such judge except as herein set forth, and that no other judge for the municipal court of Ashland county has been elected.

[SEAL.] M. J. HART,
County Clerk in and for said County,
By W. C. MORRIS,
Dep'y County Clerk.

Dated this 13th day of Feb., 1890.

(Endorsed: "Exhibit G.")

34 Be it remembered that at a term of the supreme court of the State of Wisconsin, begun and held at the capitol, in Madison, the seat of government of said State, on the first Tuesday, to wit, on the seventh day of January, A. D. 1890, on the nineteenth day of the term, to wit, on the twenty-fifth day of February, A. D. 1890—present, Orsamus Cole, chief justice, and William P. Lyon, Harlow S. Orton, David Taylor, and John B. Cassoday, associate justices of said court—the following proceedings were had, *inter alia*, to wit:

Habeas Corpus.

—— COUNTY, }
State of Wisconsin. }

In the Matter of the Application of PATRICK MANNING for a Writ of *Habeas Corpus.*

And now, at this day, came the said petitioner, by H. E. Briggs, Esq., and filed his petition herein and moved the court now here for an order to show cause why a writ of *habeas corpus* should not issue herein, as prayed for in and by his said petition; and the court being now fully advised of and concerning the same, it is ordered that the said motion by, and the same is hereby, granted, and that said order to show cause be, and the same is hereby, made returnable March 4th, 1890.

(Endorsed: State of Wisconsin, supreme court. *In re* application of Patrick Manning for writ of *habeas corpus.* Cert'd copy of order.)

35 Be it remembered that at a term of the supreme court of the State of Wisconsin, begun and held at the capitol, in Madison, the seat of government of said State, on the first Tuesday, to wit, on the seventh day of January, A. D. 1890, on the twenty-fifth day of the term, to wit, on the third day of March, A. D. 1890—present, Orsamus Cole, chief justice, and William P. Lyon, Harlow S. Orton, David Taylor, and John B. Cassody, associate justices of said court—the following proceedings were had, *inter alia,* to wit:

Habeas Corpus.

—— COUNTY, }
State of Wisconsin, }

In the Matter of the Petition of PATRICK MANNING for a writ of *Habeas Corpus.*

And now, at this day, came the parties herein, by their attorneys, and this cause having been argued on the order to show cause why a writ of *habeas corpus* should not issue out of this court herein by Rublee A. Cole, Esq., for the said petitioner, and by L. K. Luse, Esq., assistant attorney general, for the warden of the State prison, and submitted, and the court not being now sufficiently advised of and concerning its decision herein took time to consider of its opinion.

(Endorsed as follows: State of Wisconsin, supreme court. *In re* application of Patrick Manning for a writ of *habeas corpus.*)

36 In the Matter of the Petition of PATRICK MANNING for a Writ of *Habeas Corpus.*

LYON, *J.:*

In November, 1889, an information was exhibited against the petitioner in the municipal court of the city and county of Ashland charging him with the crime of manslaughter, upon which he was

tried and convicted in said court and sentenced to imprisonment in the State prison for three years, and is now so imprisoned. The facts in his case, in all other respects, are like those *In re* John Burke, decided herewith, except that this petitioner pleaded in abatement the facts stated in his petition, which are substantially the same as are stated in Burke's petition. The plea was overruled, and is of no significance upon this application. The matter is ruled by the decision in Burke's case, from which it is not distinguishable in principle.

The application for a writ of *habeas corpus* is denied and the petition dismissed.

(Endorsed as follows: State of Wisconsin, supreme court. In the matter of the petition of Patrick Manning for a writ of *habeas corpus*. Certified copy of opinion of Lyon, J.)

37 In the Matter of the Petition of JOHN BURKE for a Writ of *Habeas Corpus*.

LYON, *J.*:

In August, 1889, the petitioner was brought before L. A. Calkins, Esq., then acting as judge of the municipal court of the city and county of Ashland, for examination on a charge of embezzlement. He waived an examination and was held for trial. In September following the district attorney filed an information against him in the same court for such offense, and in October of the same year he was tried, convicted, and sentenced to imprisonment in the State prison for the term of two and one-half years. He is now serving such sentence.

The petitioner now makes application to this court for a writ of *habeas corpus*, to the end that the legality of his imprisonment may be inquired into. The foregoing facts are stated in his petition. He seeks to be released from such imprisonment because, as he alleges, there was no such court in existance as "the municipal court of the city and county of Ashland" at the time he was so convicted and sentenced, and no such officer, either *de jure* or *de facto*, as judge of such court. If these reasons exist they are undoubtedly available on *habeas corpus*, for they go to the jurisdiction. It was thought best to follow the practice indicated *In re* petition of Semler, 41 Wis., 517, and so an argument of the application was directed and has been had. All questions which could be raised on the return to the writ have been fully argued, and we are as well prepared to decide them on this application as we should be had the writ been
38 issued and were the petitioner *were* before us on the return thereto.

The municipal court of the city and county of Ashland was established by ch. 94, Laws of 1889, with jurisdiction concurrent with that of the circuit court of the same county of all cases of crimes and misdemeanors arising in that county except murder and rape. The act was published March 15, 1889, and it is provided therein that the same "shall take effect and be in force from and after its

passage and publication" (sec. 11). The act also provides as follows: "The qualified voters of the county of Ashland shall, on the first Tuesday of April, 1889, and on the first Tuesday of April every fourth year thereafter, elect a suitable person as judge of said municipal court, to be called municipal judge, who shall hold his office for the term of four years from the first Monday in January next succeeding his election and until his successor shall be elected and qualified. * * * Whenever a vacancy shall happen in the office of said judge the Governor shall fill such vacancy by appointment" (sec. 4). Power to appoint a clerk of such court is conferred upon the judge thereof by sec. 5.

The first election for judge was held under said act on the first Tuesday in April, 1889, and L. A. Calkins was duly elected. The notice of election specified that his term of office would commence on the first Monday in January, 1890. Two days after such election the Governor appointed Mr. Calkins judge of said court, to hold the office until the first Monday in January, 1890.

On the authority of State *ex rel.* Att'y Gen. *v.* Messmore, 14 Wis., 163, it is claimed that the Governor had no authority to make such appointment. For the purposes of this application it will be assumed that he had not. It should be observed, however,
39 that this application is not necessarily ruled by the Messmore case, for the appointment in that case was to the office of circuit judge, and the case was decided upon certain constitutional provisions which may not be entirely applicable here.

The questions to be determined are, Was there any such court as "the municipal court of the city and county of Ashland" when such proceedings were had against the petitioner? And if such court was then in existance are those proceedings nullities because no person had lawful authority at that time to exercise the functions of judge thereof?

We are of the opinion that these questions are fully answered *In re* Bridget Boyle, 9 Wis., 264. The facts in that proceeding are as follows: In 1859 the Legislature enacted a law establishing a municipal court in the city and county of Milwaukee. Pr. & L. L. of 1859, ch. 199. The act provided that it should take effect from and after its passage. It provided also for the election of a judge of such court on the first Tuesday in April, 1859. It was approved March 18, 1859, but was not published, and hence did not take effect until June 29th of that year. An election of such judge was held at the time appointed therefor in the act, and the person elected qualified and entered upon the discharge of the duties of the office. The election was afterward declared void by this court on *quo warranto* proceedings, and the person thus elected was ousted from the office. State *ex rel.* Att'y Gen. *v.* Foote, 11 Wis., 14. Before such ouster, but after the act of 1859 had been published, Bridget Boyle was tried in said court before such acting judge for a misdemeanor,
40 and convicted thereof, and was committed to prison for nonpayment of a fine. On *habeas corpus* the county judge discharged her from custody, but this court held, on certiorari, that notwithstanding the person acting as judge during those proceedings had

no lawful right to the office, still the imprisonment of the petitioner was not illegal. Hence the order of the county judge releasing her from custody was reversed. The only difference in the two proceedings, on their facts, is that in the Boyle case the judge was elected without lawful authority, while here he was appointed (as is assumed) without such authority. There is no difference in principle between the cases.

After holding in the Boyle case that the judge thus elected without authority of law became judge *de facto* when the law took effect, and that his right to the office could not thereafter be inquired into collaterally, the opinion, written by Mr. Justice Paine, proceeds as follows: "When it appears that the person exercising the powers of an office is in by such color of right and that he has such possession of the office as makes him in law an officer *de facto*, then his acts as to third persons are valid and his right to hold the office can only be inquired into in some direct proceeding for that purpose; and such it appears was the character of the officers here, and, the trial and conviction of the petitioner having occurred after the law was in force, we think she cannot on *habeas corpus* raise the question of the strict legal right of the judge to hold the office" (p. 267).

The rule in the Boyle case has been reaffirmed by this court in the following cases: In Dean *v.* Gleason, 16 Wis., 1, it was held that a tax voted in 1857 was not void because one-half the members of the common council which voted it were elected before the
41 city charter took effect. In the opinion by Dixon, C. J., it is said: "The charter was in force long before the levy of this tax, and those officers were at least officers *de facto*, and their acts cannot be avoided by any objection to the legality of their election."

In C. & N. W. R'y Co. *v.* Langlade Co., 56 *id.*, 614, an act of the Legislature established Langlade county, and provided that the Governor should appoint certain county officers therein, to hold their respective offices from the establishment of the county until the first Monday in January, 1882 (nearly one year), and until their successors in office should be elected and qualified. Such appointments were thereupon made by the Governor and the appointees qualified as such. This court assumed, for the purposes of the case, that the Legislature had no power to confer upon the Governor authority to make such appointments. Still the appointees were held to be officers *de facto*, the validity of whose official acts could not be questioned collaterally. The same rule was applied in Yorty *v.* Paine, 62 *id.*, 154, which involved an inquiry into the validity of official acts of certain acting town officers. The town had been created by an act of the Legislature, and such officers were elected before the law took effect, but the acts objected to were performed after it took effect. It was held that they were *de facto* officers and that their official acts were valid.

The rule established by the above cases is that if the office has been lawfully established and a person exercises the functions thereof by color of right, but whose election or appointment thereto is illegal, his official acts therein cannot be successfully at-
42 tacked in collateral proceedings, but in all such proceedings

will be valid and binding until the officer is ousted by the judgment of a court in a direct proceeding to try his title to the office.

That the municipal court of the city and county of Ashland and the office of judge thereof were in existence when the proceedings against the petitioner were had cannot be doubted. Al- of the above cases are direct authority in support of the proposition. They also demonstrate that Judge Calkins was, at the time at least, judge *de facto* of such court. We regard the fact quite immaterial that there was no statute authorizing the election of a judge of that court for a term which would include the time between April, 1889, and January, 1890. The same feature is found in each of the above cases.

The same rule was also applied in State *v.* Bloom, 17 Wis., 521; Laver *v.* McGlachlin, 28 *id.*, 364; State *v.* Bartlett, 35 *id.*, 287; State *v.* Goldstucker, 40 *id.*, 124; Sprague *v.* Brown, 40 *id.*, 612; Cole *v.* Trustees, etc., of Black River Falls, 57 *id.*, 110; Baker *v.* The State, 69 *id.*, 32. To these may be added the earlier cases of Tolle *v.* Stone, 1 Pin., 230; Lask *v.* U. S., *id.*, 77; State *v.* Williams, 5 Wis., 308. The only difference between these cases and those first above cited seems to be that in each of them the existence of the office was unquestioned, the controversy being only as to the right of a particular person to exercise its functions. Having determined in the present proceedings that the municipal court of the city and county of Ashland and the office of judge thereof were established when these proceedings were taken, these cases also are directly in point on the proposition that Judge Calkins was at least judge *de facto* of
43 such court when the proceedings were had against the petitioner.

In Van Slyke *v.* Ins. Co., 39 Wis., 390, the person whose acts were challenged was not in possession of the office, certain functions of which he had exercised, and did not claim the office. In Fenelon *v.* Butts, 49 *id.*, 342, a person exercised an office which had never been lawfully created. Hence there was no such office. It was held that these cases were not within the rule of the Boyle case and other cases above cited, and that the persons whose acts were challenged were not officers *de facto*. The distinction is plain between those cases and the present proceeding.

A rule laid down more than fifty years ago by the territorial supreme court, and constantly approved and applied by this court in so many cases ever since it was organized, should not now be disturbed. Rights of property have vested under those adjudications, and citizens have taken upon themselves the obligations and liabilities of public office on the faith of the rule. It may well be that Judge Calkins would not have entered upon his office under the executive appointment thereto, the validity of which was in doubt, had he not believed that the settled law of this State, evidenced by so many adjudications, would protect him from liability for his official acts if his appointment should afterwards be held invalid. It would be an unauthorized and most cruel exercise of judicial power to take from him, in this collateral proceeding, the protection upon which he had a right to rely, and that, too, without giv-

ing him an opportunity to be heard, thus exposing him to suits for damages by every person whom he caused to be arrested or committed to prison before the commencement of the term of office to which he was elected.

44 It is eminently proper and just that the rule *stare decisis* should be here applied.

The application for a writ of *habeas corpus* is denied and the petition dismissed.

(Endorsed as follows: State of Wisconsin, supreme court. In the matter of the petition of John Burke for a writ of *habeas corpus.* Certified copy of opin ion of Lyon, J.)

45 Be it remeмb ered that at a term of the supreme court of the State of Wisconsin, begun and held at the capitol, in Madison, the seat of government of said State, on the first Tuesday, to wit, on the seventh day, of January, A. D. 1890, on the twenty-sixth day of the term, to wit, on the eighteenth day of March, A. D. 1890—present, Orsamus Cole, chief justice, and William P. Lyon, Harlow S. Orton, David Taylor, and John B. Cassody, associate justices of said court—the following proceedings were had, *inter alia,* to wit:

Habeas Corpus.

In the Matter of the Application of PATRICK MANNING for a Writ of *Habeas Corpus.*

—— COUNTY, }
State of Wisconsin. }

The court being now fully advised of and concerning the application of the said petitioner for a writ of *habeas corpus* herein, it is now here ordered and adjudged by this court that the said application for a writ of *habeas corpus* be, and the same is hereby, denied, and that the petition herein be, and the same is hereby, dismissed.

(Endorsed as follows: State of Wisconsin, supreme court. *In re* application of Patrick Manning for a writ of *habeas corpus.*)

46 *Affidavit of Publication.*

STATE OF WISCONSIN, }
County of Ashland, } *ss:*

Jos. M. Chapple, being duly sworn, on oath says that he is the publisher of the Ashland Press, a weekly newspaper printed and published at Ashland, Ashland county and State of Wisconsin, and that the annexed printed copy of municipal election notice, which forms a part of this affidavit, was published in said newspaper once in each week for three successive weeks, commencing on the 16th day of March, A. D. 1889, and ending on the 30th day of March A. D. 1889; and, further, that the said printed notice so annexed wa

taken from the said Ashland Press, the newspaper in which the same was published.

JOS. M. CHAPPLE.

Subscribed and sworn to before me this 3d day of March, A. D. 1889.

GEO. P. ROSSMAN,
Notary Public, Wis.

47 *Municipal Election Notice.*

Notice is hereby given that a municipal election will be held in the city of Ashland on the first Tuesday in April, being the second day thereof, for the election of city officers, under the provisions of chapter 27, Laws of 1889, at which election the following officers are to be elected:

A mayor, in place of Geo. W. Harrison, whose term of office expires on the 30th day of April, 1889.

A city treasurer, in place of W. S. Beeman, whose term of office expires on the 30th day of April, 1889.

A supervisor in the first ward, in place of A. R. Mead, whose term of office expires on the 30th day of April, 1889.

An alderman in the first ward, in place of B. O. Olson, whose term of office expires on the 30th day of April, 1889.

A supervisor in the second ward, in place of Geo. W. Marshall, whose term of office expires on the 30th day of April, 1889.

An alderman in the second ward, in place of R. C. Heydlauff, whose term of office expires the 30th day of April, 1889.

A supervisor in the third ward, in place of D. G. Sampson, whose term of office will expire on the 30th day of April, 1889.

An alderman in the third ward, in place of Duncan Mc-
48 Rae, whose term of office will expire on the 30th day of April, 1889.

A supervisor in the fourth ward, in place of E. C. Cohen, whose term of office will expire on the 30th day of April, 1889.

An alderman in the fourth ward, in place of B. B. Scott, whose term of office will expire on the 30th day of April, 1889.

A supervisor in the fifth ward, in place of B. G. Armstrong, whose term of office will expire on the 30th of April, 1889.

An alderman in the fifth ward, in place of J. J. Moore, whose term of office will expire on the 30th day of April, 1889.

A justice of the peace of the first ward, in place of C. L. Judd, whose term of office will expire on the 30th day of April, 1889.

A justice of the peace in the second ward, in place of John W. Meagher, whose term of office will expire the 30th day of April, 1889.

A justice of the peace in the third ward, in place of R. R. McMullen, whose term of office will expire the 30th day of April, 1889.

A justice of the peace in the fourth ward, in place of John C. Mars, whose term of office will expire on the 30th day of April, 1889.

A justice of the peace in the fifth ward, in place of Joseph Halliday, whose term of office will expire the 30th day of April, 1889.

49 A vote will be taken at same time and place on an amendment to sec. 4, article 7, of the constitution, as passed by Legislature in 1887.

Also votes will be cast for an associate justice of the supreme court, in place of John B. Cassoday, whose term of office will expire on the first Monday in January, A. D. 1890.

Also votes will be cast for a county judge of Ashland county, in place of Edwin Ellis, whose term of office will expire on the first Monday of January, A. D. 1890.

Also a municipal judge for the county of Ashland, according to chapter 94, Laws of 1889, whose term of office will begin on the first day of January, 1890.

The following places designated by the city council are as follows: First ward, Durfee hose house; second ward, Beaser hose house; third ward, Bardon hose house; fourth ward, 113 Second street east; fifth ward, Knight hose house.

The polls of municipal election will open at 8 o'clock a. m. and close at 5 p. m.

The polls for the vote on amendment to the constitution and for judicial election will open at 9 a. m. and close at sundown of that day. All other proceedings will be conducted according to the laws governing general elections.

Witness my signature and seal of office this 13th day of March, A. D. 1889.

JOHN McCARTY,
[SEAL.] *City Clerk.*

[Endorsed:] Affidavit of publication and municipal election notice. (Copy.)

50 I, Matthew J. Hart, county clerk of said county, do hereby certify that at the general election held in the several towns, wards, and villages and election precincts and districts in said county on the 2d day of April, A. D. 1889, L. A. Calkins was by the greatest number of votes duly elected municipal judge for said county of Ashland.

Given under my hand and official seal, at the city of Ashland, this 10th day of April, A. D. 1889.

M. J. HART,
[SEAL.] *County Clerk of Ashland County.*

[Endorsed:] Certificate of M. J. Hart, county clerk of Ashland county. (Copy.)

51 In the Matter of the Application of PATRICK MANNING for a Writ of *Habeas Corpus*, &c.

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office, with all things concerning the same, in the above-entitled cause, and that I have compared all of the afore-

said-described records and papers with the originals on file and in my official custody.

That the original writ of error, with assignment of errors, the citation, with its service endorsed thereon, and the stipulation waiving a bond, are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error, hereto annexed.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Madison, this 22d day of August, A. D. 1890.

Seal Supreme Court of Wisconsin.

CLARENCE KELLOGG,
Clerk Supreme Court, Wis.

52 STATE OF WISCONSIN, *Supreme Court,* } ss:

The return to the within writ appears by the schedule hereto annexed.

The return of the justices of the supreme court of the State of Wisconsin.

Attest: CLARENCE KELLOGG, *Clerk.*

Endorsed on cover: Wisconsin supreme court. No. 1607. Patrick Manning, plaintiff in error, *vs.* George Weeks, warden of the Wisconsin State prison. Filed February 2, 1891.

Office Supreme Court U. S.
FILED,
MAR 16 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1890.

NO. 1607.

PATRICK MANNING, PLAINTIFF IN ERROR,

vs.

GEORGE WEEKS, WARDEN OF THE WISCONSIN STATE PRISON, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

RUBLEE A. COLE,
WILLIAM W. O'KEEFE,
Counsel for the Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1890.

NO. 1607.

PATRICK MANNING, PLAINTIFF IN ERROR,

vs.

GEORGE WEEKS, WARDEN OF THE WISCONSIN STATE PRISON, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

The plaintiff in error, Patrick Manning, was tried and convicted in October, 1889, for manslaughter in the so-called Municipal Court of Ashland County, the alleged manslaughter having been committed on the 26th day of May, 1887. (Motion papers on page 11.) Upon his pretended conviction he was imprisoned in the Wisconsin State Prison and in the custody of the defendant in error. Thereupon a writ of *habeas corpus* was applied for in the Wisconsin Supreme Court and denied, and a writ of error thereupon issued from this Court to review such refusal. The petition for the writ of *habeas corpus* is found in the transcript of the record and in the motion papers heretofore filed herein.

(pages 11, 12, 13 and 14 of the motion papers). The assignment of errors is also found in the transcript of the record and in the motion papers heretofore filed herein. (pages 9 and 10 of the motion papers). Since then a writ of error has been applied for in the State Supreme Court to review the trial and conviction of Manning, and all the objection as to want of jurisdiction, both state and national, atttempted to be raise in this proceeding, again raised and overruled by that Court. The opinion on such hearing has not been officially reportedat this time, and a certified copy of each opinion is offered with this brief and asked to be filed and considered in connection with the argument in this case, as is also that portion as to the Municipal Court act of the opinion of the Wisconsin Supreme Court in the case of Frank G. Martin, Plaintiff in Error vs. The State of Wisconsin, defendant in error, not officially reported, but a certified copy of which is asked to be filed and considered in this case.

ARGUMENT.

The contention is, in this case, that Governor Hoard had no constitutional or other authority warranting or even giving him color of authority to appoint L. A. Calkins Municipal Judge, prior to the first Monday in January, 1890; that it has long been the settled law of Wisconsin that a court can not be begun by an appointment and neither the Legislature nor the Governor had any such authority, either to subscribe or appoint, and that in so acting in this case, Governor Hoard in effect, and the State of Wisconsin by his act, deprived Patrick Manning of his liberty without due process of law, and denied Patrick Manning within the jurisdiction of the State of Wisconsin the equal protection of the laws.

See authorities cited and argument in the printed motion papers heretofore filed herein by plaintiff in error on pages 14, 15, 16 and 17 of such motion papers, and the Municipal Court Act, (Chapter 94, Laws of 1889, of the State of Wisconsin) on pages 5, 6, 7 and 8, of such printed motion papers.

Ex parte Commonwealth of Virginia, 100, U. S. 339.

Same case, Book 25, L. C. Op. S. C. Reports, See p. 679.

Section 2420, R. S. Wis., 1878: "The circuit courts * * * have power to hear and determine, within their respective circuits * * * all cases of crimes and misdemeanors of every kind, not exclusively cognizable by a justice of the peace or some other inferior court * * "

Section 4649, R. S. Wis., 1878. "All informations shall be filed during the term in the court having jurisdiction of the offenses specified therein, except as hereinafter provided, by the district attorney of the proper county as informant, and he shall subscribe his name thereto."

Section 4654 R. S. of Wis. (amended by ch. 173, 1881). "No information shall be filed against any person for any offense until such person shall have had a preliminary examination as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination. * * * But no failure or omission of such preliminary examination shall in any case invalidate any information in any court, unless the defendant shall take advantage of such failure or omis-

sion, before pleading to the merits by plea in abatement."

Section 4775, R. S. of Wis. 1878: "For the apprehension of persons charged with offenses, the judges of the several courts of record, in vacation as well as term time, court commissioners and all justices of the peace, are authorized to issue process to carry into effect the provisions of this chapter."

Section 4809 of R. S., Wis., 1878: "Whenever any person charged with having committed any offense, shall be brought before any justice of the peace, or other magistrate, for examination, in accordance with the provisions of this chapter, if such person, before the commencement of the examination, shall make oath that, from prejudice or other cause, he believes that such justice or other magistrate will not decide impartially in the matter, then said justice or other magistrate shall transmit all the papers in the case to the nearest justice or other magistrate qualified by law to conduct the examination, who shall proceed with the examination * * * "

Thus it is seen that the Municipal Court so-called, (L. A. Calkins acting as judge thereof) acting and existing by the wholly unconstitutional act of Governor Hoard, even so conceded by the State Supreme Court on the oral argument, would, under Section 1 of the Municipal Court act, exclude all justices and other constitutional magistrates, from acting in preliminary examination and under Section 2 of said Municipal Court act the district attorney would be required to file the information before Judge Calkins instead of the Circuit Court of Ashland Co. Thus Manning did not have equal protection of the law and was deprived

of his liberty without due process of law. The denial of this right seems significant. taken in connection with the that fact an information for burglary during the same period prior to January 1890,was filed in the Ashland Circuit Court and the jurisdiction of that court sustained notwithstanding this Municipal Court provision. (See certified opinion in Martin case herewith filed.) Such a construction seems to have left the determination of where a man should be tried to the mere caprice of the district attorney, which can not, it would seem, be equal protection of the laws. Thus Governor Hoard's unconstitutional act set all this in operation and divested the rights of justices, other magistrates and citizens, and it would seem this cannot be equal protection of the laws, nor can Manning's imprisonment, it would seem, be with "due process of law."

Norton vs. Shelby County, 118, U. S. 425.
Same case, Book 30, Lawyer's Co. Op. Sup. C. R. p. 178, especially 186.

In re Boyle 9, Wis. 624 seems clearly distinguishable in its features. There the bill provided that the judge should go into office immediately upon election, provided for an election of the judge; the judge was elected as provided by the bill, though the election was held prior to the official publication of the act, and Boyle was tried and convicted after the publication of the act. A prominent member of the Wisconsin bar is authority for the statement that the late U. S. Senator M. H. Carpenter of Wisconsin, always contended that in re Boyle was as nearly holding that there could be both a *de facto office* and a de *facto officer* as he could conceive.

This case goes to much greater length, it would seem, as there is even no term created in the bill prior to the term beginning January, 1890, and running until four years thereafter. (See Sec. 4, Municipal Court act, motion papers pages 6 and 7.) There could be no such term constitutionally created for such time prior to January, 1890, unless the law incorporated with it a provision for an election for such term. (State vs. Messmore, 14, Wis. 163.)

As was said in the Frank G. Martin case "The act is clearly prospective" and it is apparent upon its face that the only thing the law expected to bring about prior to January 1890 was the election of a judge as prescribed. Because a person attempting to act as judge prior to January 1890 might be sued for false imrisonment does not seem any adequate answer to these objections; and if so, it would seem that a state can do much as it pleases and its officers act regardless of law and the constitution; thus denying its citizens equal protection in given cases without remedy.

Respectfully submitted,

RUBLEE A. COLE,

WILLIAM W. O'KEEFE,

Counsel for the Plaintiff in Error

Supreme Court of the United States.

PATRICK MANNING, 1607

Plaintiff in Error.

---VS.---

GEORGE WEEKS, as Warden of the State Prison of the State of Wisconsin.

Defendant in Error.

MOTION.

RUBLEE A. COLE,

Counsel for Plaintiff in Error.

TIMES PRINT, ASHLAND, WIS.

SUPREME COURT OF THE UNITED STATES.

PATRICK MANNING,

Plaintiff in Error.

---VS.---

GEORGE WEEKS, as Warden of the State Prison of the State of Wisconsin.

Defendant in Error.

UNITED STATES OF AMERICA,
STATE OF WISCONSIN, } ss.
Ashland County.

Now comes the plaintiff in error, Patrick Manning, by his counsel and moves this Honorable Court for leave to file the annexed affidavit and exhibits and to file the writ of error and return thereto herein and docket the cause and to prosecute IN FORMA PAUPERIS.

It appearing that the said plaintiff in error is now in custody of the said George W. Weeks as warden of the state prison of the State of Wisconsin, the speedy action of this Honorable court in the premises is earnestly prayed. Respectfully submitted,

RUBLEE A. COLE,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

PATRICK MANNING,
Plaintiff in Error.
—VS.—
GEORGE W. WEEKS, as Warden of the State Prison of the State of Wisconsin,
Defendant in Error.

STATE OF WISCONSIN,
DODGE COUNTY. } ss.

Patrick Manning being duly sworn deposes and says that he is the Patrick Manning named in the above entitled action and the petitioner in the petition heretofore made in the above entitled matter which petition was denied by the Supreme court of the State of Wisconsin which court refused him a writ of habeas corpus and to review which refusal a writ of error has issued from this court, as deponent is informed and verily believes, which writ of error and the return thereto are now, as deponent is informed and verily believes, in the hands and custody of this court.

And deponent further says that he is poor and has absolutely no means, property, money, or credit whatever with which he can employ counsel on his behalf herein and he has been and is unable to pay the expenses of the clerk's fees and of the docketing of the case and of printing the record herein and is wholly unable to procure any one to have the same done upon his credit and deponent prays an order of this court appointing counsel in his behalf and that this cause may be prosecuted IN FORMA PAUPERIS and that the record herein may be printed at public expense.

That at the time of the signing of the stipulation in the record herein deponent and his attorney, Rublee A. Cole, who signed the same and appeared by virtue of the

authority conveyed by the affidavit, order and authority certified copies of which are annexed hereto and marked "Exhibit A," and made part hereof, as well as by consent and request of deponent, expected and supposed that sufficient funds to cover the clerk's costs and cost of printing the record in Supreme court of the United States could and would be furnished by certain friends of your deponent but after diligent effort upon the part of deponent and in his behalf deponent has been wholly unable and is wholly unable to procure such funds and in consequence thereof makes this request that this cause may be prosecuted IN FORMA PAUPERIS and that the record herein may be printed at public expense.

And deponent further says that he is now in the custody of the warden of the state prison of the State of Wisconsin at Waupun in the County of Dodge in said state and is so detained solely by reason of the causes more particularly set forth in the petition for a writ of habeas corpus herein; and deponent further states that the same appears to be a pretended conviction of deponent of manslaughter in the third degree in that said Patrick Manning did feloniously kill and slay on the 26th day of May in the year 1887 in said county, M. Murray, against the peace and dignity of the State of Wisconsin as was charged in the information and a copy of which is in the return to writ of error herein; and deponent further says that this preliminary examination and trial and conviction and sentence which was had in the Municipal court of Ashland county, Wisconsin, did not take place until October and November in the year 1889; and deponent further alleges that the law creating the Municipal court of Ashland county to-wit: Chapter 94 of the laws of Wisconsin for 1889, as deponent is informed and verily believes, was not passed, approved nor published until the year 1889, and after the time of the commission of the offense as charged in the information and found by the verdict and upon which the pretended sentence was rendered and was and is as to deponent and the offense charged an EX POST FACTO law and contrary to the constitution of the United States; and a correct copy of which law as deponent is informed and verily believes is annexed hereto and made a part hereof and marked "Exhibit B." and the same is taken from an authorized publication of such law made by order of the common council of the City of Ashland, Wisconsin.

That by the said Municipal court law your deponent, as he is informed and verily believes, was deprived of his constitutional right to a preliminary examination before a justice of the peace of the city and county of Ashland and to such a preliminary examination before an unprejudiced justice of the peace of the said city and county and was also deprived of his constitutional right to a trial on the charge before the Circuit court of the County of Ashland and before a constitutional jury in such Circuit court to the great disadvantage of your deponent and contrary to the provisions of the constitution of the United States and was otherwise prejudiced to his great disadvantage as more particularly set forth in the petition to the Supreme court of the State of Wisconsin and a copy of which petition is embodied in the return to the writ of error herein.

And your deponent further says that he is a citizen of the United States and resides in the State of Wisconsin and is now imprisoned or restrained in his liberty, and confined unjustly, illegally and without authority of law as he is advised, by the warden of the Wisconsin state prison as heretofore set forth herein.

And your deponent further says and asks that he have leave to prosecute IN FORMA PAUPERIS and that Rublee A. Cole, of Ashland, Wisconsin, be appointed as his attorney herein.

And deponent asks that said cause be advanced upon the calendar and set for

some day at the earliest convenience of the court. PATRICK MANNING.

Subscribed and sworn to before me this
15th day of January A. D. 1891.

JACOB FUSS,
Notary Public,
[SEAL.] Dodge County,
Wisconsin.

STATE OF WISCONSIN, COUNTY OF DODGE, } ss.
Office of Clerk of Circuit Court. }

I, George W. Morse, clerk of the circuit court of the County of Dodge, in the State of Wisconsin, the said court being a court of record and having a seal, do hereby certify that Jacob Fuss, esquire, whose name appears subscribed to the annexed instrument was at the date hereof a notary public, within and for said state, residing in said county, duly appointed and qualified, and empowered by the laws of said state to administer oaths and take acknowledgements of deeds; and perform such other duties as by the law of nations or according to commercial usage may be performed by notaries public; and that to his acts and attestations, as such, full faith and credit are and ought to be given in the court and out. I further certify that I verily believe such signature purporting to be his is genuine; that the seal thereto attached is a correct impression of his official seal; and that said instrument is executed and acknowledged according to the laws of the state.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Juneau, in said county and state, on said sixteenth day of January, A. D., 1891.

GEO. W. MORSE,
[SEAL.] Clerk of Circuit Court as aforesaid.

"EXHIBIT A."

IN MUNICIPAL COURT ASHLAND COUNTY.

THE STATE OF WISCONSIN, Plaintiff
against
PAT MANNING, Defendant.

STATE OF WISCONSIN, } ss.
ASHLAND COUNTY. }

Pat Manning being duly sworn upon oath says that he is the defendant in the above entitled action; that he is indicted in the aforesaid court upon a charge of manslaughter; that affiant is poor and has absolutely no means, property, money or credit whatever with which he can employ counsel or subpoena witnesses on his behalf therein, and that after due diligence and effort on his part, is unable to procure counsel or the attendance of witnesses. That are necessary and material witnesses on behalf of defendant without whose testimony he cannot proceed to trial. Wherefore affiant prays an order from this court appointing suitable counsel to defend him at public expense and the subpoenaing of said witnesses not to exceed six (6) in number.

Affiant further says that he has consulted with W. W. O'Keefe about his defense herein, that they have advised him and are informed of the facts upon which affiant relies as his defense to said charge and affiant respectfully asks that the said W. W.

O'Keefe be appointed as his attorney therein.

PATRICK MANNING.

Subscribed and sworn to before me this 1st day of October, A. D., 1889.
W. W. O'Keefe,
Notary Public, Wis.

IN MUNICIPAL COURT, ASHLAND COUNTY.

THE STATE OF WISCONSIN, Plaintiff,
vs.
PAT MANNING, Defendant.

On reading and filing the affidavit of Pat Manning the said defendant hereto annexed, and it appearing to the satification of the court that sufficient cause exists therefor:

It is ordered that W. W. O'Keefe, attorney at law of Ashland, Wisconsin, be and he is hereby appointed to defend the above named defendant Pat Manning, and such witnesses as are actually material and necessary not to exceed six in number and actually used on the trial at public expense.

By the Court,
L. A. CALKINS. Judge.

STATE OF WISCONSIN.

IN MUNICIPAL COURT, ASHLAND COUNTY.

STATE OF WISCONSIN, Plaintiff,
vs.
PAT MANNING, Defendant,

I hereby authorize Rublee A. Cole my law partner, to appear personally herein as of counsel and sign my name as attorney and his own name as counsel or to sign the firm name Cole & O'Keefe as attorneys of the defendant herein and authorize the said Rublee A. Cole to act as one of the attorneys for the defendant or of counsel and I sign this authority by reason of the fact that I have been appointedby this court to defend the said Patrick Manning at public expense; but this appointment will make no further expense than the appointment of one attorney herein and his appearance as to expense and charge against the county shall stand as my appearance.

Dated this 1st day of February, 1890.

W. W. O'KEEFE,
Defendant's Attorney.

STATE OF WISCONSIN, } ss.
ASHLAND COUNTY. }

I, Edgar Foster, clerk of the Municipal court, of said county do hereby certify that I am the clerk of the Municipal court of the County of Ashland in the State of Wisconsin, that I have compared the annexed and foregoing affidavit order and authority for appearance with the orignal affidavit order and authority for appearance which are on file and of record in my office and in my legal custody and that they are true and correct copies of said affidavit order and authority for appearance and of the whole thereof, and that this certificate is in due form and sufficient under the laws

of the State of Wisconsin, interlineations as to court and as to affidavit and order made before signature.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Ashland in the said County of Ashland on this 12th day of January, A. D., 1891.

(SEAL.)

EDGAR FOSTER,
Clerk of the Municipal court of the City and County of Ashland in the State of Wisconsin.

STATE OF WISCONSIN, } ss.
COUNTY OF ASHLAND. }

I, L. A. Calkins, judge of the Municipal court of the City and County of Ashland, State of Wisconsin and judge of the Municipal court for the County of Ashland aforesaid, do hereby certify that I am such judge as aforesaid and that Edgar Foster is clerk of the Municipal court for the County of Ashland in the State of Wisconsin and was such clerk at the date of the foregoing certificate and that the signature of Edgar Foster to the foregoing and annexed certificate is the original and genuine signature of the said Edgar Foster and that the foregoing and annexed certificate and attestation is in due form and would be a sufficient certificate and attestation under the laws of the State of Wisconsin.

Dated this 12th day of January, A. D., 1891.

L. A. CALKINS,
Judge of the Municipal court of the City and County of Ashland in the State of Wisconsin.

(SEAL.)

"EXHIBIT A."

THE FOLLOWING IS A PORTION OF "EXHIBIT B":---

MUNICIPAL COURT BILL.

[PUBLISHED MARCH 15, 1839.]

CHAPTER 94, LAWS 1889.

An Act to Create the Municipal Court of the City and County of Ashland.

THE PEOPLE OF THE STATE OF WISCONSIN REPRESENTED IN SENATE AND ASSEMBLY DO ENACT AS FOLLOWS:

Section 1. A MUNICIPAL COURT FOR THE CITY AND COUNTY OF ASHLAND IS HEREBY ESTABLISHED, UNDER THE NAME OF THE MUNICIPAL COURT FOR ASHLAND COUNTY. The name shall be a court of record, have a clerk, and a seal with a suitable device, to be procured under the direction of the judge thereof at the expense of the city of Ashland. Said court may exercise powers

and jurisdiction equal to, and concurrent with, the Circuit court of Ashland county, in all cases of crimes and misdemeanors arising in said county except murder and rape. Such jurisdiction includes the right to try and determine all appeals in civil or criminal cases from justices of the peace, and police justices of said county. NO JUSTICE OF THE PEACE, POLICE JUSTICE OR COURT COMMISSIONER WITHIN SAID CITY OF ASHLAND, SHALL EXERCISE ANY JURISDICTION IN CRIMINAL OR BASTARDY CASES, BUT ALL SUCH JURISDICTION IS VESTED IN THE JUDGE OF SAID COURT; AND ALL EXAMINATIONS RECOGNIZANCES AND COMMITMENTS FROM SAID JUDGE, JUSTICES OF THE PEACE AND POLICE JUSTICES OF SAID COUNTY, IN CRIMINAL CASES (EXCEPT MURDER AND RAPE) AND IN BASTARDY CASES SHALL BE CERTIFIED AND RETURNED TO SAID MUNICIPAL COURT INSTEAD OF SAID CIRCUIT COURT AT LEAST FIVE DAYS BEFORE THE TIME FIXED FOR THE APPEARANCE OF THE ACCUSED; and the accused shall, and all witnesses required to attend may be committed to be brought or recognized to appear before said municipal court, on a day certain, not more than thirty days from the date of said commitment or recognizance. * * * * * * *

Section 2. The general provisions of law which shall at any time be in force relative to Circuit courts, and actions and proceedings therein shall relate also to said Municipal court, unless inapplicable, and the rules of practice prescribed by the justices of the Supreme court for Circuit courts shall be in force in said Municipal court, and its rules of practice and proceedings shall conform as nearly as practicable to the rules and practice of Circuit courts, but in case of the change in the place of trial of any cause not originally commenced in said court of any criminal case begun by information or of any bastardy case certified to said court, said case shall be removed to the Circuit court for Ashland county, unless such change is taken on the ground of prejudice of the people of said county, in which case the place of trial shall be changed to the Circuit court of an adjoining county within this state. * * * * * * * * * * *

ALL INFORMATIONS FOR CRIMINAL OFFENSES, EXCEPT MURDER AND RAPE, COMMITTED IN SAID COUNTY OF ASHLAND, SHALL BE FILED IN SAID MUNICIPAL COURT. BY THEDISTRICT ATTORNEY OF SAID COUNTY. AT THE NEXT TERM AT WHICH THE SAME MAY BE TRIABLE, IF TERMS ARE HELD AS HEREINAFTER PROVIDED, AND IF NOT BEFORE THE DAY FIXED FOR THE TRIAL THEREOF. IT SHALL BE THE DUTY OF SAID DISTRICT ATTORNEY TO PROSECUTE ALL CRIMINAL ACTIONS IN SAID COURT IN WHICH THE STATE IS A PARTY. * * * *

Section 3. * * * * * * * * * * * * * * The general provisions of law, relative to civil and criminal actions before justices of the peace, shall apply to said Municipal court so far as applicable, and shall so apply when the value of the property in controversy or the amount of money or damages claimed or sought to be recovered exceeds two hundred dollars, EXCEPT THAT NO CHANGE OF VENUE SHALL BE TAKEN FROM SAID COURT IN ANY CIVIL CASE ORIGINALLY COMMENCED IN SAID COURT, OR IN ANY CRIMINAL OR BASTARDY EXAMINATION, OR CRIMINAL TRIAL, EXCEPT CASES TRIED UPON INFORMATION AS HEREINBEFORE PROVIDED. * * * * *

Section 4. THE QUALIFED VOTERS OF THE COUNTY OF ASHLAND SHALL, ON THE FIRST TUESDAY IN APRIL, 1889, AND ON THE FIRST TUESDAY IN APRIL EVERY FOURTH YEAR THEREAFTER ELECT A SUITABLE

PERSON TO THE OFFICE OF JUDGE OF SAID MUNICIPAL COURT, TO BE CALLED MUNICIPAL JUDGE, WHO SHALL HOLD HIS OFFICE FOR THE TERM OF FOUR YEARS FROM THE FIRST MONDAY IN JANUARY NEXT SUCCEEDING HIS ELECTION, AND UNTIL HIS SUCCESSOR SHALL BE ELECTED AND QUALIFIED, AND WHO MAY BE REMOVED FROM OFFICE IN THE MANNER PROVIDED IN THE CONSTITUTION OF WISCONSIN FOR THE REMOVAL OF JUDGES OF THE CIRCUIT AND OF THE SUPREME COURT. Whenever a vacancy shall happen in the office of said judge, the governor shall fill such vacancy by appointment. The person so appointed shall hold the office until his successor shall be elected and qualified. Elections to fill the vacancy, for the residue of the term only, shall be held in the manner provided in section 88 of the revised statutes for other judges, and notice thereof shall be given by the county clerk of said county in the same manner as for elections of county judges. All such elections shall be held and conducted, and the votes cast thereat shall be returned and canvassed and a certificate shall be given in all respects as provided by law in case of the election of county judges. Said judge, before entering upon the duties of his office, shall take and subscribe the oath of office prescribed by the constitution, which oath shall be filed in the office of the clerk of said city and a duplicate thereof in the office of the the clerk of the Circuit court of said county. Said judge may by an order in writing to be filed in said court, appoint any justice of the peace of said county or the county judge thereof, to discharge the duties of such judge during his absence sickness or other temporary disability. The appointee shall have all the powers of such judge while administering such office, except the power to try cases begun by information and cases not originally begun in said court. The order appointing any such county judge or justice of the peace may be revoked by said judge at any time. * * * * * *

Section 7. Said judge may, if he deems it best, by order in writing filed in said court, direct terms to be held for the trial of offenses on which information may be filed, and of bastardy cases and of all other cases not originally commenced in said court, not exceeding four in any one year. When such terms are ordered, the clerk of said court, in the presence of the judge, at least three days before such term, shall draw from the list of persons selected as hereinafter provided, to serve as jurors therein, thirty-six jurors for such term, and shall issue a venire to summon them as such. If no such terms are ordered the court shall fix a particular day for the trial of the cases heretofore mentioned in this section, not more than twenty days after the day fixed in the recognizance or commitment for the appearance of the accused, or after the filing of the return on appeals and in other cases, and a jury shall be drawn in the open court in the presence of the accused and prosecuting officer, in criminal and bastardy cases, and of the parties or their attorneys, in civil cases on the day of the trial; but such jury may be drawn in the same manner at any previous time by the consent of the parties. All such juries shall be drawn in the manner following: The clerk shall draw in the presence of the court, from a box containing the names of all persons not disqualified by previous service, furnished by the senior alderman and supervisors as hereinafter provided, thirty-six names and shall make a list thereof and each party alternately, beginning with the prosecution or plaintiff, shall strike a name from such list, until only twelve names remain. In case either party shall neglect or refuse to strike out such names, the judge shall appoint some person to strike for him. The twelve persons whose names remain shall be summoned as jurors in such cases. In all actions before such judge, originally commenced in said court excepting cases begun by informa-

tion and bastardy cases eighteen names from whom a jury shall be struck shall be drawn from such box in like manner, each party striking six names instead of twelve, in the manner aforesaid. The day for the trial may be adjourned from time to time in the discretion of the court. If any person thus drawn cannot be summoned or be excused or set aside as incompetent another name may be drawn from said list to supply his place and the person whose name is so drawn shall be summoned in like manner, or the judge may direct the issue of a venire to said sheriff to summon the neccessary jurors to complete the panel from said county at large. In any case where a jury of twelve is required, said judge may at his option direct the sheriff or one of his deputies to make a list of thirty-six qualified electors from any or all the towns of said county from which list a jury shall be struck and summoned in the same manner as hereinbefore provided, and in case any of said juror cannot be summoned or be excused from any cause, a sufficient number of talesmen to complete the panel may be summoned in the manner hereinbefore provided, and upon thewritten request of either party that a jury may be drawn from the body of thecounty, the judge shall direct such lists to be made from the body of the county and a jury shall be obtained by striking twenty-four names from such list, and the persons represented by the twelve names remaining shall make a jury and be summoned as aforesaid; the talesmen necessary for any cause, to complete the panel and make a jury may be summoned from the body of the county. Every person having served as a juror at any regular term of said court, shall be disqualited from serving as a juror at the next succeeding term, except he shall be summoned on a special venire or as a talesman, and every person having served as a juror in any case not tried as a regular term of said court shall be disqualified from again serving for three months next succeeding such service except at a regular term. The clerk shall not replace in the box from which the names of jurors are drawn the name of any person whils such person is disqualified from acting as a juror by reason of previous service.

Section 8. The senior alderman and supervisor from each ward in the city of Ashland shall each, before the first Tuesday in April in each year, make a list of twenty qualified electors who are citizens of the United States in his ward to serve in said court as jurors for one year from said first Tuesday in April, and deliver said list to said judge. A jury trial in said court in criminal cases begun by information or not originally begun in said court, may be waived by the accused in writing, or by consent in open court entered on the minutes. In civil cases the jury shall be deemed waived unless demanded by one of the parties before entering upon the trial. In trials on information, bastardy cases and cases not originally commenced in said court, a jury shall consist of twelve jurors. * * * * *

Section 10. Nothing in this act shall be construed as in any manner affecting the right or jurisdiction of any court, judge, justice of the peace or police justice to hear, try and determine any cause now pending in such court or before such judge, justice of the peace, or police justice or WHICH MAY BE COMMENCED BEFORE THE JUDGE OF SAID MUNICIPAL COURT SHALL ENTER UPON THE DUTIES OF HIS OFFICE.

Section 11. This act shall take effect and be in force from and after its passage and publication.

Approved March 14, 1889. * * * * *

"EXHIBIT B."

SUPREME COURT OF THE UNITED STATES OF AMERICA.

PATRICK MANNING,
Plaintiff in Error,
—vs.—
GEORGE WEEKS, as warden of the State Prison of the State of Wisconsin,
Defendant in Error.

It is hereby stipulated and agreed by and between Rublee A. Cole, attorney for the plaintiff in error herein, and C. E. Estabrook, attorney general of the state of Wisconsin, attorney for the defendant in error herein, that the plaintiff in error need no file an undertaking for costs herein and that the same is hereby waived; and that neither party will tax costs against the other in event of judgment in his favor in the Supreme court of the United States, but that the clerk's costs and the cost of printing the record in the Supreme court of the United States shall be paid by the plaintiff in error herein and that each party hereto shall pay his other costs herein.

Dated this 16th day of July A. D., 1890.

RUBLEE A. COLE,
Attorney for plaintiff in error.
C. E. ESTABROOK,
Attorney general of the State of Wisconsin,
Attorney for defendant in error.

SUPREME COURT OF THE UNITED STATES OF AMERICA.

PATRICK MANNING,
Plaintiff in error.
—vs.—
GEO. WEEKS, as warden of the State Prison of the State of Wisconsin,
Defendant in Error.

ASSIGNMENT OF ERRORS.

The plaintiff in error respectfully submits the following as his assignment of errors to the judgment of the Supreme court of the State of Wisconsin upon his application for a writ of habeas corpus and for his discharge thereon and the denial of such relief;

1. That the Supreme court of Wisconsin erred in holding that the Municipal court of the City and County of Ashland, and the office of judge thereof were in existence when the proceedings against the plaintiff in error in said pretended court were had.

2. That the legislature of the State of Wisconsin, even if it so attempted in Chapter 94 of the laws of the State of Wisconsin for the year 1889, had no constitutional power to create a Municipal court for the city and county of Ashland for a period prior to January 1890, unless such law in its provisions prescribed for the election of the judge of such court for such period prior to January 1890 by the qualified electors of such jurisdiction, and if Chapter 94 of the laws of the State of Wisconsin for the year 1889 has attempted to create such a court otherwise for such period prior to January 1890 the State of Wisconsin by its legislature has made, and by its highest court has enforced a law which has deprived the plaintiff in error of his liberty without due process of law and has denied to plaintiff in error within its jurisdiction the equal protection of its laws. That the Supreme court of Wisconsin erred in

giving any force to such law and sanctioning the proceedings pretended to be had thereunder.

3. That the act of Governor Hoard in the pretended appointment of L. A. Calkins as Municipal judge of the Municipal court of the city and county of Ashland for the period prior to January 1890 gave Judge Calkins no color of office either DE FACTO or DE JURE prior to January 1890 and the Supreme court of the State of Wisconsin erred in holding otherwise.

4. That the State of Wisconsin by the act of Gov. Hoard in the pretended appointment of L. A. Calkins as Municipal judge prior to January 1890 denied to Patrick Manning the plaintiff in error herein, the equal protection of the laws within the State of Wisconsin and deprived the plaintiff in error of his liberty without due process of law and the Supreme court of the State of Wisconsin erred in not so holding.

5. That the Supreme court of the State of Wisconsin erred in holding that the plea of abatement to the jurisdiction of the pretended Municipal court interposed in the said pretended Municipal court did not directly challenge the jurisdiction of said pretended Municipal court and in deciding that such plea in abatement raised the question collaterally.

6. That the Supreme court erred in not deciding that the imprisonment of the plaintiff in error was without due process of law, that it was involuntary servitude as a punishment for an alleged crime whereof the party had not been duly convicted and that the plaintiff in error had been denied the equal protection of the laws within the State of Wisconsin and in not awarding him a writ of habeas corpus and granting him a discharge thereon.

7. That the Supreme court erred in not holding that Gov. Hoard administered Chapter 94 laws of Wisconsin for 1889 "with an evil eye and unequal hand" in giving such a construction to the law as to endeavor to constitute a court in Ashland county by appointment and thereby divest the jurisdiction of the justices of the peace and Circuit court of criminal jurisdiction contrary to the laws enforced elsewhere in the State of Wisconsin and contrary to the plain import of the law upon its face and contrary to the constitutional provisions of the constitution of the State of Wisconsin and of the United States.

8. That the Supreme court of the State of Wisconsin erred in its construction of Chapter 94 laws of Wisconsin for 1889 against the plain import of the law upon its face with, it would seem, the purpose of protecting Hon. W. D. Hoard and Judge Calkins in an unwarranted and unconstitutional exercise of authority.

9. That by reason thereof the Supreme court of the State of Wisconsin erred in not awarding the plaintiff in error a writ of habeas corpus and in not granting him his discharge from the custody of the warden of the state prison of the State of Wisconsin.

Wherefore the plaintiff in error prays that the Supreme court of the United States will reverse the judgment of the Supreme court of the State of Wisconsin and will direct such court to grant the plaintiff in error a writ of habeas corpus and to order his discharge thereon.

Dated this 16th day of July, 1890.

RUBLEE A. COLE;
Attorney for Patrick Manning,
Plaintiff in Error.

INFORMATION:---

"STATE OF WISCONSIN,
MUNICIPAL COURT, ASHLAND COUNTY,

STATE OF WISCONSIN. }
against }
PAT MANNING. }

I, George P. Rossman, district attorney of said county, hereby inform the court that on the 26th day of May, in the year 1887, at said county, Pat Manning did, feloniously kill and slay M. Murray, against the peace and dignity of the State of Wisconsin.

Dated August 31, 1889.

GEO. P. ROSSMAN,
District Attorney."

Endorsed "Filed Oct. 8, 1889, J. C. Mars clerk, Ashland County."

VERDICT:---

"Nov. 6, 1889. Defendant in court * * * * * * * Jury returned into court at 3:30 p. m. with the following verdict:

We, the jury sworn and empanneled to try and determine the above entitled action find that the defendant, Pat Manning, is guilty of man-slaughter in the THIRD degree.

Dated, Nov. 6, 1889.

B. G. ARMSTRONG,
Foreman."

Copy of Petition is as follows:—

State of Wisconsin,
In Supreme Court.
In the matter of the application of Patrick Manning for a writ of habeas corpus to inquire into the legality of his imprisonment and custody by Hon. George Weeks, Warden of the Wisconsin State Prison. } Petition.

To the Supreme court of the state of Wisconsin.

The petition of Patrick Manning respectfully shows:—

1. That your petitioner, Patrick Manning is imprisoned and restrained from his liberty by the Hon. George Weeks, the warden of the State Prison of the State of Wisconsin.

2. That the said Patrick Manning is not committed or detained by virtue of any process, judgment order or execution specified in section three thousand four hundred and eight of the revised statutes of the state of Wisconsin, or any act amendatory thereof, as your petitioner is informed and verily believes.

3. That the cause or pretense of such imprisonment is as follows to-wit:—

That a pretended preliminary examination upon complaint and arrest made upon a pretended warrant issued thereon, by one L. A. Calkins pretending to act as the Municipal judge of Ashland county was held in the month of August 1889, of the said Patrick Manning on the charge that he did feloniously kill and slay one M. Murray; that upon said pretended examination and at the conclusion thereof the said L. A. Calkins bound the said Patrick Manning, your petitioner, over to the so-called next regular term of the so-called and pretended Municipal court of Ashland county to answer to a criminal prosecution for manslaughter as appears from a certified copy of

the proceedings of the said pretended Municipal courtof Ashland county, which is annexed hereto and made a part hereof and marked "Exhibit A;" that on the 5th day of September 1889, an information was made by George P. Rossman, district attorney of the county of Ashland, Wisconsin, in the said pretended Municipal court of Ashland county in a cause entitled The State of Wisconsin Plaintiff and Pat Manning defendant and which Pat Manning is your petitioner herein and that a certified copy of such information together with the pleas of your petitioner in abatement thereto and of his motion to dismiss the jury in such pretended court is annexed hereto and made a part hereof and marked "Exhibit B;" that thereupon a pretended arraignment and trial of your petitioner was held in snch pretended Municipal court of Ashland county in the manner and form and with the result as set forth in the docket of such pretended courtland a certified copy of the docket entries thereon in the docket of such pretended court is annexed hereto and made a part hereof and marked "Exhibit C;" that as appears therefron there was pretended verdict of a jury in such pretended court that your petitioner Patrick Manning, was guilty of manslaughter in the third degree and thereupon said pretended court on the 9th day of November 1889, sentenced your petitioner Patrick Manning, to be confined in the State Prison at Waupun for the term of three years; and your petioner Patrick Manning, was, therefore, and thereupon under a certificate of said court taken to said prison and there bound over upon such commitment to the warden thereof and transferred to the custody of the warden of such prison; and your petitioner Patrick Manning, ever since has been and now is therein confined upon such certificate issued by the pretended clerk of such pretended court upon such pretended trial and sentence, that a copy of said pretended certificate of conviction demanded of said the warden by the attorneys of your petitioner is annexed hereto and made a part hereof and certified by the warden as a true copy and is marked "Exhibit D."

4. That the said imprisonment and restraint is illegal and void and contrary to law, as your petitioner is informed and verily believes, for the following reasons to-wit:—

That at said time there was no such constitutional and legal court as "the Municipal court for the city and county of Ashland," and that there was no such office either DE JURE OR DE FACTO as that of Municipal judge of Ashland county; and therefore there could be no such officer as Municipal judge of Ashland county either DE JURE OR DE FACTO; and there was no such office either DE JURE OR DE FACTO as that of clerk of the Municipal court of Ashland county; and, therefore there could be no such officer as clerk of the Municipal court of Ashland county; either DE JURE OR DE FACTO; and that all proceedings had before said L. A. Calkins and said J. C. Mars and the said pretended jury were illegal and void and contrary to law and the constitutional provisions contained in both the constitution and amendments thereof of the State of Wisconsin and the constitution and amendments thereof, of the United States. That your petitioner as he is informed and verily believes is and has been deprived of his liberty without due process of law. That your petitioner as he is informed and verily believes has been denied the right of trial by a constitutional jury. That your petitioner as he is informed and verily believes, has been by the enactment of chapter 94 of the laws of 1881 of the State of Wisconsin and by the acts heretofore mentioned and by those hereafter to be mentioned upon the part of W. D. Hoard and one L. A. Calkins and others been by the State of Wisconsin deprived of his liberty without due process of law and has been denied within the jurisdiction of the state of Wisconsin the equal protection of the laws.

That said L. A. Calkins in acting as Municipal judge of Ashland county, as your petitioner is informed and verily believes acted under a pretended appointment from one Hon. W. D. Hoard, Governor of the state of Wisconsin, and under no election by the qualified electors of his judicial district and that a certified copy of such appointment is hereto annexed and made a part hereof and marked "Exhibit E;" that the said J. C. Mars or John C. Mars as your petitioner is informed and verily believes acted as such pretended clerk of the Municipal court of Ashland county, by virtue of a pretended appointment by the said L. A. Calkins the said pretended Municipal judge and a certified copy of such pretended appointment is hereto annexed and made a part hereof and marked "Exhibit F;" that the said L. A. Calkins prior to the first Monday in January 1890 held his office by virtue of no election of the qualified electors in his judicial district, your petitioner is informed and verily believes; and there is annexed hereto and made a part hereof and marked "Exhibit G," a certificate of the County Clerk of Ashland county that no election has been held in said county to felect a Municipal judge for Ashland county for any term prior to the term beginning on the first Monday of January 1890.

That your petitioner is informed and verily believes that by reason of all the aforesaid facts that the pretended sentence of Patrick Manning, your petitioner, to the state prison at Waupun aforesaid for the term of three years was and is unconstitutional and null and void; and that the said pretended court and the said pretended officers had no constitutional or other authority to impose such sentence and they were neither DE JURE OR DE FACTO officers and their acts were and are unconstitutional and null and void; and the said sentence and imprisonment thereunder and said certificate of conviction and the authority under and by which said warden now holds and restrains Patrick Manning, your petitioner, are each and all of them unconstitutional and null and void and contrary to law and the constitutions of both the state of Wisconsin and the United States, as your petitioner is informed and verily believesas to of all the same.

Wherefore your petioner prays for a writ of habeas corpus to inquire into the cause of said impisonment and the legality thereof and that your petitioner the said Patrick Manning, may be discharged from said imprisonment.

Yours Etc.,

COLE & O'KEEFE,

Attorneys for said petitioner Patrick Manning and in his behalf.

State of Wisconsin, } ss.
Ashland County. }

Rublee A. Cole being duly sworn upon oath says that he is one of the attorneys of the firm of Cole & O'Keefe above named; that he is one of the attorneys of the petitioner Patrick Manning named in the foregoing petition; that he has heard read the above and foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to those matters therein stated on information and belief and as to those matters he believes it to be true.

That he makes this verification for and on behalf of the petitioner Patrick Manning above named and as one of his attorneys, that W. W. O'Keefe who is a member of the firm of Cole & O'Keefe was in the active management, and that said firm of Cole & O'Keefe, generally, were the attorneys; for the said Patrick Manning at and during he trial and proceedings hereinbefore had and now are his said attorneys and that the facts stated in said petition foregoing except those stated on information and belief

and as to those he beleves it to be true are within the personal knowledge of deponent as one of such atterneys, and all the papers, documents and records, referred to except the certified copy of the governor's appointment of Calkins and the copy of the purported certificate of conviction from the warden are in the different offices respectively named in the City of Ashland, Ashland county Wisconsin; and the said certified copies have all been obtained by the firm of Cole & O'Keefe and this deponent as a member of said firm and have been and now are in the custody of said firm of Cole & O'Keefe and of this deponent as a member thereof as such attorneys and are in a great measure unknown to the petitioner, Patrick Manning, except as stated.

That the reason why this petition is not verified by said Patrick Manning your petitioner, Patrick Manning, is that he is now more than one hundred miles from his said attorneys and not within Ashland county and from the place where said records and files pertaining to said imprisonment now are, and that the grounds of belief of deponent are derived from a personal acquaintance with and a knowledge of the facts of the case as one of the attorneys of Patrick Manning and a personal attendance upon a portion of the proceedings of the said purported trial and conviction and a personal familiarity and inspection of the records, files and papers pertaining to the pretended arrangement, trial, conviction, sentence and committment to the state prison at Waupun of said Patrick Manning.

Subscribed and sworn to before me this 13th day of Feb. 1890.

RUBLEE A. COLE.

JAMES W. GOOD,
(SEAL.) Notary Public,
Ashland County,
Wisconsin.

Article 7. Section 2. Constitution of Wisconsin.

"Section 2. The judicial power of this state, both as to matters of law and equity, shall be vested in a Supreme court, Circuit courts, courts of probate, and in justices of the peace. The legislature may also vest such jurisdiction as shall be deemed necessary in Municipal courts, and shall have power to establish inferior courts in the several counties, with limited civil and criminal jurisdiction. Provided, that the jurisdiction which may be vested in Municipal courts shall not exceed, in their respective municipalities, that of Circuit courts, in their respective circuits, as prescribed in this constitution; and that the legislature shall provide as well for the election of judges of the Municipal courts, as of the judges of inferior courts, by the qualified electors of the respective jurisdictions. The term of office of the judges of said Municipal and Inferior courts shall not be longer than that of the judges of the Circuit court."

ARGUMENT.

Whether an officer sentencing a prisoner was an officer DE FACTO or not can be inquired into on HABEAS CORPUS. Also whether he had the authority to impose the sentence given.

IN RE BOYLE, 9 Wis., 264. See p. 267.

EXPARTE LANGE 85 U. S. (18 Wallace) 163-205.

THE PEOPLE EX REL TWEED V. LISCOMB, 60 N. Y. 559. See p. p. 565 ET SEQ.

The want of any preliminary examination should properly be pleaded in abatement.

STATE V. LEICHAM, 41, Wis. 565.

In the case of the State v. Mesmore, 14 Wis., p. 163 the facts creating the court over which Mesmore sought to preside are different from this case. There was a short term of the court—i. e. an office for a short term created—which was not the case with the Municipal court of Ashland county.

The facts in the Mesmore case material on the above point are thus stated by the court in its reports:—(See 14 Wis., p. 165).

"By the act approved March 30th, 1861, it was enacted that the counties of Crawford, Bad Ax, La Crosse, Monroe and Jackson should thereafter constitute the sixth judicial circuit; * * * * ; THAT THERE SHOULD BE ELECTED IN APRIL, 1862, a judge for said SIXTH JUDICIAL CIRCUIT, whose term of office should commence on the 1st day of January, 1863: AND THAT THE GOVERNOR SHOULD APPOINT A PERSON TO THE OFFICE OF JUDGE OF THE SIXTH CIRCUIT, TO FILL THE VACANCY CREATED BY THE CHANGE IN THE BOUNDARIES THEREOF, WHO SHOULD HOLD HIS OFFICE UNTIL THE 1ST OF JANUARY, 1863, AND UNTIL — —" etc.

State v. Mesmore 14 Wis., see p. 165.

"It is also declared that the act should take effect, so far as related to THE SIXTH * * * circuits, from and after the 10th of April, 1861, * * *"

State v. Mesmore, 14 Wis., p. 165.

There is no provision in the Municipal court act (Chapter 94, laws of 1889) providing for a short term of office for the judge of that court prior to the first Monday in January, 1890; and no provision authorizing the governor to appoint a judge for a short term prior to January 1890. This distinguishes the facts as to the Municipal court of Ashland county from the facts as to Mesmore's rights as a DE FACTO officer; as it does as to the rights of the Municipal judge in the case of In re Boyle.

See State v. Mesmore, 14 Wis., 163.

State v. Bloom, 17 Wis., 521.

In re Boyle, 9 Wis., 264.

Ry. Co. v. Langlade Co., 56 Wis., 614 Especially, p. 527-2.

See section 4, ch. 94, laws 1889 which prescribe that a judge shall be elected whose term shall begin on the first Monday in January 1890. As before stated there was in the bill no provision for a prior term for the judge nor any provision that the governor should appoint a judge for any such prior term.

There is another very significant fact that should be carefully observed in determining the question whether Calkins was a DE FACTO judge prior to January 1890,—upon the authorities hereafter to be cited—and that is this:—there was a validly existing and created SIXTH judicial circuit prior to the act of March 30th, 1861 changing its boundary; and there was therefore, THE OFFICE OF THE JUDGE OF THE SIXTH JUDICIAL CIRCUIT PRIOR TO JANUARY 1st, 1863, independently of the act of March 30th, 1861.

See Facts as stated in report; State v. Mesmore. 14 Wis., 163.

Also facts as stated in State v. Bloom, 17 Wis., 521.

Ry. Co. v. Langlade Co. 56 Wis.. 615 p. 627-9. (Also see head note sub div. 6 to that case.)

In other words at the time Mesmore acted as judge for the sixth judicial circuit o Jackson county and sentnced Bloom, there was the office of such judge, but the proper person to haveacted as judge was judge, Geo. Gale and not Mesmore.

STATE V. MESMORE, 14 Wis., 163.

STATE V. BLOOM, 17 Wis., 521.

It is contended that this completely distinguishes Mesmore's claim as a DE FACTO

judge from Calkins' claim as a DE FACTO judge under the decisions hereafter to be cited; that there can be no DE FACTO officer unless there is an office DE JURE in existence.

COLE V. PRESIDENT Etc., 57 Wis., 110 p. 113.

YORTY V. PAINE et al, 62 Wis., 154 p. 161.

BAKER V. STATE, 69 Wis., 32 p. 37.

See as to fact that Gale was still judge of the sixth judicial circuit.

State v. Mesmore, 14 Wis., p. 174 ET SEQ.

It is further contended that for judicial purposes the Municipal court of Ashland county was not fully organized until a judge of that court elected as provided therein took his office and qualified on the first Monday of January 1890,—in other words until that time, the act was not completely operative—and there was no office of judge of the Municipal court which any one had a right to exercise judicial functions in—There was no office DE JURE. There was no court in PRAESENTI in fact or in law.

PALMS V. SHAWANO CO., 61 Wis. 211, p. 216-217.

Chapter 114, laws of Wisconsin for 1879:

STATE V. MESMORE, 14 Wis., see p. 177.

Section 2, Article VII. Cons. Wis.

FENELON VS. VAN SLYKE, 49 Wis., 342 especially p. 347.

Ry. CO. V. LANGLADE CO., 56 Wis., 614 head note sub-div. 6 on p. 18.

" * * * The legislature may also vest such jurisdiction as shall be deemed necessary in Municipal courts and shall have power to establish inferior courts in the several counties, with limited civil and criminal jurisdiction. Provided, that the jurisdiction which may be vested in Municipal Courts shall not exceed, in their respective municipalties, that of Circuit courts, in their respective circuits, as prescribed in this constitution; AND THAT THE LEGISLATURE shall provide as well for the election of judges of the Municipal courts, as of the judges of inferior courts, by the qualified electors of the respective jurisdictions. * * * "

Section 2 Article VII. Con. Wis.

Governor Hoard went beyond his power in appointing Calkins Municipal Judge till January 1890; he encroached upon the power of the justices of the peace of Ashland County, as well as other magistrates in Ashland County, and the criminal jurisdiction of the Circuit court of Ashland county both as to the June and December terms of 1889, and sought to confer upon Calkins prerogatives which could not be thus conferred and which Calkins could not assent to hold even as a DE FACTO judge; because there was no power in the legislature to provide even that the governor could confer such power nor could the legislature take these constitutional prerogatives and confer them upon any one except an officer elected by the qualified electors of the respective jurisdictions."

Section 2 Article VII. Cons. Wis.

The prerogative of the justices, other magistrates and Circuit court in criminal matters were in full force and excluded any right of Calkins until the first Monday in January, 1890, and there was no office of Municipal judge of Ashland county.

STATE v. MESMORE, 14 Wis., 163; Especially pp. 179 et seq.

NORTON v. SHELBY COUNTY, 118 U. S. 425 Especially p.

Same case Book 30 Co. Op. Sup. Ct. Reports p. 178 Especially p. 186.

The Municipal court law as to Manning, the plaintiff in error, was an EX POST FACTO law and unconstitutional and void.

Article 1. Section 9; Article 1. Section 10; Article 3. Section 2 of the Constitution of the United States.

Kring vs. Missouri, 17 Otto 221-251; S. C.

Book 27, Lawyers Co-Op, S. C. Rep. 506.

EX PARTE MEDLEY, 134 U. S. 160, S. C. book.

33, Lawyers Co-Op S. C. Rep. 835.

The plaintiff in error raises the question that the state court trying him was existing contrary to the constitution of the United States and therefore it would seem that this Honorable Court should determine the question and not dismiss the case.

Scott et al, Executors of Pennywit, vs. Eaton, 15 Wallace 380, 381.

Same case, book 21, Co-Op. S. C. Rep. p. 72.

Respectfully submitted,

RUBLEE A. COLE,

Counsel for Plaintiff in Error.

Supreme Court of the United States.

..... TERM, ...

No. ..... .

PATRICK MANNING, PLAINTIFF IN ERROR,

vs.

GEORGE WEEKS, AS WARDEN OF THE STATE PRISON OF THE STATE OF WISCONSIN, DEFENDANT IN ERROR.

Now comes the plaintiff in error, Patrick Manning, by his counsel, and moves this honorable Court, upon the motion papers heretofore filed herein and upon the record herein and upon all the proceedings heretofore had herein, that this cause may be advanced upon the calendar.

And further moves the Court that Rublee A. Cole, of Ashland, Wisconsin, be appointed as his attorney herein, or that such appointment be denied upon the express ground that the appointment in the State court is sufficient to authorize such appearance.

Respectfully,

RUBLEE A. COLE,
Counsel for Plaintiff in Error.